(27,043)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 957.

FREDERICK J. MACLEOD AND EVERETT E. STONE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, PETITIONERS,

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 4, 1919.

1 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. In Equity.

PUBLIC SERVICE COMMISSION

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Reservation.

At the request of the parties I reserve this case for the determination of the Full Court upon the bill and the answer.

CHARLES A. DE COURCY,
J. S. J. C.

February 12, 1919.

Bill of Complaint.

1. And now come your complainants, Frederick J. Macleod, Everett E. Stone, and Joseph B. Eastman, and allege that this bill of complaint is brought by them in their official capacity as members of the Public Service Commission of the Commonwealth of Massachusetts.

2. And your complainants say that the New England Telephone and Telegraph Company is a corporation organized under the laws of the State of New York and having a usual place of business in this Commonwealth; that it is, and for a long time has been, a public-service corporation doing business in the Commonwealth as a foreign corporation engaged in the business of transmitting intelligence within the Commonwealth by electricity by means of telephone lines, including the operation of all conveniences, appliances, instrumentalities, and equipment utilized in connection therewith and appertaining thereto.

3. And your complainants say that on or about July 31, 1918, the President of the United States, acting under a joint resolution
2 of Congress, a copy of which is hereto annexed as Exhibit "A," took possession and assumed control of all telephone properties and systems of the United States, including the system and property of the said New England Telephone and Telegraph Company, placing said properties in the general charge and direction of the Postmaster-General of the United States; that thereupon he entrusted the direction and operation of its system and property to the New England Telephone and Telegraph Company.

4. And your complainants allege that on December 21, 1918, the New England Telephone and Telegraph Company, pursuant to the directions of the Postmaster-General, filed with the Public Service Commission of the Commonwealth, under the provisions of St. 1913,

c. 784, sec. 20, notice that, effective on January 21, 1919, it proposed to make certain changes in the telephone toll rates and practices to be charged and put into effect by it in accordance with schedules filed together with such notice; that, on January 9, 1919, said Commission, pursuant to the provisions of section 21 of said statute gave notice of a public hearing upon such proposed new schedules of rates to be held on January 17, 1919; that such hearing was duly begun on that date, the New England Telephone and Telegraph Company being represented, and then adjourned to January 30, 1919, at which time the representative of the New England Telephone and Telegraph Company was fully heard.

5. And your complainants further say that on January 20, 1919, they duly issued an order in accordance with the provisions of said section 21, suspending the taking effect of the proposed schedules of new rates until February 20, 1919, a copy of which order is hereto annexed as Exhibit "B;" that this order was duly served forthwith upon the New England Telephone and Telegraph Company; that on January 31, 1919, the complainants made a report with reference to said proposed schedules of new rates, and in connection therewith entered an order requiring the New England Telephone and Telegraph Company forthwith to cancel the rates and charges stated in said proposed schedules and to put in effect the rates theretofore charged. A copy of this report and order is hereto annexed as Exhibit "C."

6. And your complainants further say that, notwithstanding said order of January 20th (Exhibit "B"), the New England Telephone and Telegraph Company, on January 21, 1919, put into effect the rates stated in said proposed schedules and is now proceeding to charge the same for all service rendered by it to the public covered by said schedules, and that it intends to continue to charge
3 said rates notwithstanding the orders of the complainants as above stated; that it denies the jurisdiction of the complainants to enter said orders or in any other manner to fix or to determine the rates to be charged by it for service between points within this Commonwealth, and claims that these orders are null and void.

7. And your complainants further say that, under the provisions of said chapter 784 of the Acts of 1913 and said joint resolution (Exhibit "A"), it is the duty of the respondent, New England Telephone and Telegraph Company, to obey the provisions of said orders, particularly said final order (Exhibit "C") entered January 31, 1919.

Wherefore, your complainants pray—

(1) That, pending the final decision herein, an interlocutory decree be entered enjoining and requiring the New England Telephone and Telegraph Company to suspend such new schedules and not to make use of the charges stated therein, so far as they affect telephone rates between points in the Commonwealth of Massachusetts, until the further order of the Court.

(2) That a final decree may be entered to the same effect.

(3) That the respondent be ordered by mandatory injunction to

comply with the aforesaid order of the Public Service Commission entered January 31, 1919.

(4) For such other and further relief as to this Honorable Court shall seem proper.

FREDERICK J. MACLEOD,
EVERETT E. STONE,
JOSEPH B. EASTMAN,
Public Service Commission of Massachusetts,
By HENRY C. ATTWILL,
Attorney-General,
By WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

I, Frederick J. Macleod, one of the petitioners in the above-entitled case, hereby certify that I have read the foregoing petition and that the statements therein contained are true to the best of my knowledge and belief, except so far as they are made upon information and belief, and that such statements I believe to be true.

FREDERICK J. MACLEOD.

4 BOSTON, MASS., February 1, 1919.

Personally appeared the above-named Frederick J. Macleod and made oath that the foregoing statement by him subscribed is true, before me.

WM. HAROLD HITCHCOCK,
Justice of the Peace.

Filed February 1, 1919.

EXHIBIT "A."

Joint Resolution

To authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

1 Resolved by the Senate and House of Representatives
2 of the United States of America in Congress assembled,
3 That the President during the continuance of the present war
4 is authorized and empowered, whenever he shall deem it
5 necessary for the national security or defense, to supervise
6 or to take possession and assume control of any telegraph,
7 telephone, marine cable, or radio system or systems, or any
8 part thereof, and to operate the same in such manner as may
9 be needful or desirable for the duration of the war, which
10 supervision, possession, control, or operation shall not extend
11 beyond the date of the proclamation by the President of the
12 exchange of ratifications of the treaty of peace: Provided,
1 That just compensation shall be made for such supervision,

possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

(July 16, 1918.)

EXHIBIT "B."

The Commonwealth of Massachusetts,

Public Service Commission.

January 20, 1919.

(P. S. C. 2350.)

Notice of the New England Telephone and Telegraph Company, the Highland Telephone Company, the Providence Telephone Company of Massachusetts, and the Heath Telephone Company, of Proposed Changes in Toll Telephone Rates.

In the matter of the proposed changes in toll telephone rates by the New England Telephone and Telegraph Company, the Highland Telephone Company, the Providence Telephone Company of Massachusetts and the Heath Telephone Company, as shown in basic toll rate schedules, filed in this office December 21, 1918, in accordance with Telegraph and Telephone Bulletin No. 22, Order 2495 of the Postmaster-General of the United States, effective in the Commonwealth of Massachusetts January 21, 1919, the Commission having entered upon an investigation as to the propriety of said changes,—it is

Ordered, That the operation of said schedules, so far as they affect toll telephone rates between points in the commonwealth of Massachusetts, be suspended and the use of the changes stated therein be deferred until February 20, 1919, unless otherwise ordered by the Commission.

And it is

Further ordered, That a copy of this order be filed with said

schedules at the office of the Commission and that a copy hereof be forthwith served upon the New England Telephone and Tele-
6 graph Company, the Highland Telephone Company, the Providence Telephone Company of Massachusetts, the Heath Telephone Company, and the Postmaster-General of the United States.

Attest:
(Signed) ANDREW A. HIGHLANDS,
[SEAL.] *Secretary.*

A true copy.

Attest:
(Signed) ANDREW A. HIGHLANDS,
Secretary.

EXHIBIT "C."

The Commonwealth of Massachusetts,

Public Service Commission.

JANUARY 31, 1919.

[P. S. C. 2350.]

Notices of Changes in Rates for Telephone Toll Service within Massachusetts in Accordance with Telegraph and Telephone Bulletin No. 22, Order No. 2495, of the Postmaster-General of the United States, Filed by the New England Telephone and Telegraph Company, the Highland Telephone Company, the Heath Telephone Company, and the Providence Telephone Company of Massachusetts.

On July 16, 1918, Congress adopted a resolution (see Appendix A) empowering the President to take possession and assume control of telephone and telegraph properties during the war, for a period not to extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace. Under authority of this resolution, all properties of this character in the country were taken over on July 31, 1918, by virtue of a proclamation of the President dated July 22, 1918, which directed that the supervision, possession, control and operation of such telegraph and telephone systems should be exercised by and through the Postmaster-General, Albert S. Burleson.

By Order No. 1744 of the Postmaster-General, dated July 23, 1918, John C. Koons, First Assistant Postmaster-General, David J. Lewis, Commissioner, United States Tariff Commission, and
7 William H. Lamar, Solicitor of the Post-Office Department, were appointed "a committee for the Governmental management, operation and control of the telegraph and telephone systems covered by the proclamation of the President dated July 22,

1918", the Postmaster-General being the chairman of this committee. On October 5, 1918, the proposal of the American Telephone and Telegraph Company, in behalf of itself and of the constituent companies comprising the Bell system, with respect to just compensation for the use of the properties owned by it and by these other companies during the period of Federal control was accepted by the Postmaster-General, and on October 15, 1918, the board of directors of the New England Telephone and Telegraph Company formally joined in this proposal which had thus been accepted. We are informed that similar contracts have been or are to be made with the Heath Telephone Company, the Highland Telephone Company and the Providence Telephone Company of Massachusetts.

On December 13, 1918, more than a month after the signing of the armistice, the Postmaster-General issued an order (Telegraph and Telephone Bulletin No. 22, Order No. 2495) directing that comprehensive changes in telephone toll rates be made throughout the country. On December 21, 1918, a schedule embodying these changes, in the case of toll service within the commonwealth, was filed by the New England Telephone and Telegraph Company with this Commission, effective January 21, 1919, and similar schedules were filed by the Heath Telephone Company, the Highland Telephone Company and the Providence Telephone Company of Massachusetts. On January 9, 1919, the Commission gave notice that a public hearing upon these proposed new schedules would be held on January 17, 1919, and sent a communication to the Postmaster-General (see Appendix B) stating that it could not, in good faith with the people of Massachusetts, allow the new rates to become effective with its approval until they had been shown to be just and reasonable.

At the public hearing, Matt B. Jones, then vice-president and now president of the New England Telephone and Telegraph Company, appeared for the Postmaster-General and read into the record a letter (See Appendix C) which the Commission had received from W. H. Lamar, Solicitor for the Post-Office Department, and a member of the committee for the governmental management, operation and control of the telegraph and telephone systems. The hearing continued throughout the day and upon notification that Mr. Jones wished to present additional evidence, it was adjourned until January 30, 1919, the earliest available date, the Commission announcing that the taking effect of the new schedules would be sus-
8 pended, under the provisions of section 21 of chapter 784 of the Acts of 1913, pending further investigation and the decision thereon.

On January 20, 1919, an order was duly issued by the Commission suspending the taking effect of the new schedules until February 20, 1919. The Postmaster-General was forthwith notified by wire that such an order had been issued and copies were served by mail upon him and upon the companies involved. Notwithstanding this order, and in direct violation of its provisions, the rates so suspended were placed in effect on January 21, 1919, have been in effect ever since, and are in effect now. In accordance with section 28 of chapter 784 of the Acts of 1913, the Commission directed the attention of the

Attorney-General to this violation of its order, and of the law of the commonwealth, and requested him to begin at once an action or proceeding in the Supreme Judicial Court of Massachusetts in the name of the Commission for the purpose of having such violation stopped and prevented, either by mandamus or injunction. Proceedings of this nature have been instituted by the Attorney-General and are now pending.

The entire disregard by the Postmaster-General of the suspension order entered by the Commission in accordance with the laws of the commonwealth, made it clear that the primary issue to be considered is one of jurisdiction, and that it would be undesirable to undertake an extensive investigation, with a view to determining whether or not the new rates are just and reasonable, until this question is settled. The representative of the Postmaster-General in this matter, Mr. Jones, agreed with this conclusion, and in order that this issue might be raised in the most definite manner and determined promptly, he directly challenged and denied the jurisdiction of the Commission in the premises, at the continued hearing on January 30, 1919, and rested his case upon this denial and upon the letter of the Solicitor for the Post-Office Department referred to above. His action was taken, however, upon the understanding that, if the jurisdiction of the Commission should be sustained by the courts, either the Postmaster-General, or the companies if they should then be in private control, should be free without prejudice to file schedules of rates similar to those which have now been placed in effect, as we believe illegally, and submit evidence to prove their justice and reasonableness.

In the opinion of the Commission its jurisdiction in the premises, which certainly existed prior to the resolution of Congress, was preserved by that resolution. The final proviso reads as follows:

> Provided, further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of
> 9 the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

There are many decisions of the United States Supreme Court indicating that the public supervision of rates charged by a public utility company is an exercise of police powers and covered by the designation, "lawful police regulations." It is obvious, also, that such supervision by this Commission in the present instance would in no way "affect the transmission of Government communications, or the issue of stocks and bonds" by the telephone companies. Nor is there anything in the history of the legislation to indicate that it was the intent of Congress to set aside or nullify the powers of the States over telephone charges. It is a matter of common knowledge that the resolution was adopted because of the danger that telegraph service would be interrupted by labor troubles, and it was clearly the desire of Congress to insure continuity of both telegraph and telephone service during the war, rather than to inaugurate, under Government auspices, revolutionary changes in methods of charging.

Under the circumstances, since the immediate question is one of jurisdiction, it is unnecessary either to describe or to discuss the new rates at any length. It may be said that, in Massachusetts and throughout the entire territory which the New England Telephone and Telegraph Company serves, it is conceded that they represent a substantial increase in charges. Attention is called also to the fact that it is stated in the letter of Solicitor Lamar (See Appendix C) that the main purpose of the new schedule is to remove the "many inconsistencies and irregularities which heretofore have existed in the toll schedules of telephone companies in many parts of the United States" and to standardize the rates from a nation-wide standpoint, so that between any two points in any part of the country they would be "exactly the same as between any two equi-distant points in any other part of the country." The effect on revenues was not "the prime consideration for the schedule," and the Postmaster-General was not advised as to the effect upon the revenues of the New England Telephone and Telegraph Company. Of this reasoning it is sufficient to say that it does not seem to the Commission by any means self-evident that the toll rates between two points in the thickly-settled territory of Massachusetts should necessarily be the same as the rates between any two equi-distant points in some dissimilar part of the country, that we know of no public demand for such a standardization, and that we are not aware of any inconsistencies or irregularities in the toll schedules which have heretofore existed in Massachusetts which have caused complaint from patrons or have been prejudicial to the proper operation of the telephone properties.

As the record is now left, however, and for the purpose of testing at once the question of jurisdiction, the Commission finds that the burden of proof imposed by section 21 of chapter 784 of the Acts of 1913, in the case of proposed changes in rates, has not been sustained by the Postmaster-General or by the companies, and that the telephone toll schedules which were in actual effect in Massachusetts prior to January 21, 1919, and which are still, as we believe, in legal effect, are just and reasonable and embody the rates which should be charged by the companies in question. An order to this effect is entered below. It is entered without prejudice to the right of any party in interest, after the question of jurisdiction has been determined, to present to the Commission further evidence as to the reasonableness either of the old or the new rates under consideration.

Order.

Notices of Changes in Rates for Telephone Toll Service within Massachusetts in Accordance with Telegraph and Telephone Bulletin No. 22, Order No. 2495, of the Postmaster-General of the United States, filed by the New England Telephone and Telegraph Company, the Highland Telephone Company, the Heath Telephone Company and the Providence Telephone Company of Massachusetts.

It appearing that on December 21, 1918, the New England Telephone and Telegraph Company, the Heath Telephone Company, the

Highland Telephone Company and the Providence Telephone Company of Massachusetts issued and filed with this Commission schedules of rates for telephone toll service within the commnowealth, effective January 21, 1919, each of which was designated "Basic Toll Rate Schedule, issued in accordance with Telegraph and Telephone Bulletin No. 22, Order No. 2495 of the Postmaster-General of the United States;" that the commission entered upon an investigation concerning the justice and reasonableness of the rates proposed in said schedules, duly notifying and holding public hearings on January 17, 1919, and on January 30, 1919; and that the Commission,
by an order dated January 20, 1919, entered in accordance
11 with section 21 of chapter 784 of the Acts of 1913, suspended
the taking effect of said schedules of rates until February 20, 1919, pending further investigation and the decision thereon.

It further appearing that a full investigation of the matters and things involved has been had and that the Commission, under date hereof, has made a report containing its findings of fact and of law and conclusions thereon, which said report is hereby referred to and made a part hereof,—

It is

Ordered, That the carriers respondent herein and designated in said schedules, namely, the New England Telephone and Telegraph Company, the Heath Telephone Company, the Highland Telephone Company, and the Providence Telephone Company of Massachusetts be, and they are hereby, notified to cancel forthwith the rates and charges stated in the schedules specified above and in said order of suspension, which rates and charges have been found by the Commission to be unjust and unreasonable.

It is

Further ordered, That said respondents be and they are hereby notified and required to put in force and effect forthwith, and thereafter to maintain within the commonwealth of Massachusetts, the rates and charges for telephone toll service which were in effect prior to January 21, 1919, and which are stated in the schedules now on file in the office of this Commission as the lawful rates and charges within the commonwealth for such service, which rates and charges have been found by the Commission to be just and reasonable.

It is

Further ordered, That copies of this order be filed at the office of the Commission with the schedules herein ordered to be cancelled, and that copies hereof be forthwith served upon the New England Telephone and Telegraph Company, the Heath Telephone Company, the Highland Telephone Company and the Providence Telephone Company of Massachusetts, and upon the Postmaster-General of the United States.

By the Commission,
(Signed) ANDREW A. HIGHLANDS,
Secretary.

A true copy.
Attest:

____ ____,
Secretary.

12 APPENDIX A.

[Appendix A is a copy of the Joint Resolution hereinbefore printed as Exhibit A, at page 4.]

APPENDIX B.

Letter to the Postmaster-General of the United States

Public Service Commission,

Boston.

JANUARY 9, 1919.

Hon. Albert S. Burleson, Postmaster-General of the U. S., Washington, D. C.

DEAR SIR: On December 21, 1918, the New England Telephone and Telegraph Company filed with this Commission a basic toll rate schedule issued in accordance with your Telephone and Telegraph Bulletin No. 22, Order No. 2495, and effective January 21, 1919. This schedule provides for so large and so general an increase in charges within Massachusetts that the Commission has felt that it ought not to permit the new rates to go into effect, with its approval, until cause has been shown. For this reason it has set the matter down for public hearing on Friday, January 17, 1919, at 10:30 A. M., the hearing to be held at the office of the Commission at No. 1 Beacon Street, Boston, in order that an opportunity may be given to representatives of the company or to your own representatives to explain the reasons for the change. We have been reluctant to take this step, for the Commission has been desirous of helping you in the successful administration of the telephone properties in every way that we could. The increases proposed, however, are very substantial and it has not seemed to the Commission that it could, in good faith with the people of Massachusetts, give its sanction to the new schedule until it had been shown to be just and reasonable.

Very truly yours,

(Signed) FRED J. MACLEOD,
Chairman.

13 APPENDIX C.

Letter of the Solicitor of the Post Office Department.

Post Office Department,

Office of the Solicitor.

WASHINGTON, January 15, 1919.

Hon. Fred J. Macleod, Chairman, Public Service Commission of Massachusetts, 1 Beacon Street, Boston, Massachusetts.

DEAR SIR: I beg to acknowledge receipt of your letter of January 9, 1919, addressed to the Postmaster General, and advising that your

commission will hold a hearing on Friday, January 17, 1919, in the matter of the toll rates prescribed in Bulletin No. 22, Order No. 2495, issued by the Postmaster General on December 13, 1918, which was duly filed by the New England Telephone and Telegraph Company with your commission to become effective January 21, 1919.

While the New England Company, which, as you are aware, is now and ever since August 1, 1918 has been operating its properties for the account of the Government and not for the benefit of its stockholders, will represent the Postmaster General at your hearing and present the case on its merits, it may not be amiss for me to say that the main purpose of said schedule of rates as embodied in Bulletin No. 22 was to remove the many inconsistencies and irregularities which heretofore have existed in the toll schedules of telephone companies in many parts of the United States, and to treat the subject from a nation-wide standpoint so that the rates for toll and long distance service between any two points in any part of the country would be exactly the same as between any two equidistant points in any other part of the country. The particular rates in this schedule in Bulletin No. 22, as well as the general basis of the structure, were the result of an exhaustive study covering several months by the committee on standardization of rates in this Department, and the general scheme represents, we believe, the best effort that has been devised to place this vital matter of the telephone toll service of the entire country on a unified and scientific basis.

Owing to the multitude of irregularities and inconsistencies heretofore obtaining in the toll schedules of the different com-
14 panies, which grew up over a long period of years by reason of local conditions and the varying views of telephone officials, each of whom saw the proposition from the standpoint of his own particular company, it is obvious that any scheme of standardizing the rates from a nation-wide standpoint must result in the lowering of rates in some places and the raising of rates in others, with the corresponding inevitable effect of increasing or diminishing the revenues in particular localities, but such effect on revenues was not the prime consideration for the schedule, and as a matter of fact the Postmaster General is not advised as to what may be the effect on the revenues of the New England Company in Massachusetts.

It appeared to be the consensus of opinion of those best versed in telephone affairs that there should be a unification and standardization of telephone rates throughout the country, and that the first step in such a problem was the establishment of a unified and comprehensive schedule of rates for toll and long distance service, and the schedule in question embodies the effort to make that first step.

As in the view of the Postmaster General the prime purpose of this schedule is to place the toll service throughout the entire country on the same basis, and, inasmuch as the telephone using public in Massachusetts will pay thereunder for such service exactly the same rates as will the telephone using public in every other state of the Union for similar service, leaving no room for there being any question of discrimination against the telephone using public of Massachusetts, it would seem unfortunate that any attempt should

be made at this time, in advance of actual experience of operations under this new schedule, to reach a conclusion by estimates and opinions as to what the actual effect would be on the revenues from such service in any particular state. For, it would seem obvious, that no national, comprehensive scheme of rates could be made effective in any reasonable period of years, if investigations and tests as to probable revenue results, from the standpoint of different and various theories, must be made in each particular state of the Union, in advance of actual application of the scheme.

The Postmaster General will welcome any assistance which your commission can give in testing the actual operation of the schedule and in securing data with respect thereto in order to determine later whether any modifications of said schedule should be made, as well as to have light for the further step in the problem; to wit, standardization of local or exchange rates. Of course, you will understand that by the standardization of local or exchange rates I do not mean to convey the impression that such rates for all places will be the same, but that the localities throughout the country will be classified according to the conditions prevailing in each, and then rates will be prescribed to fit the conditions of each class of locality.

Very truly yours,

(Signed) W. H. LAMAR,
Solicitor.

Special Appearance of the New England Telephone and Telegraph Company.

Now comes the New England Telephone and Telegraph Company, named as the respondent in the above-entitled suit, and appears specially for the purpose of objecting to the jurisdiction of this Court over the parties hereto, or over the alleged cause of suit.

JAMES N. CLARK,
By POWERS & HALL,
Attorneys,
101 Milk Street, Boston, Mass.

Filed February 5, 1919.

Answer of the New England Telephone and Telegraph Company.

Now comes the New England Telephone and Telegraph Company, named as the respondent in the above-entitled suit and hereinafter called the respondent, and without waiving its objection heretofore made to the jurisdiction of the Court over the parties hereto or over the alleged cause of action, but expressly relying thereon, for answer to the bill of complaint says as follows:

1. The respondent admits the allegations of fact contained in paragraph 1 of the bill of complaint, but expressly denies that the complainants have or possess any authority, power, or jurisdiction to bring this bill of complaint.

2. Answering the allegations contained in paragraph 2 of the bill of complaint the respondent admits that it is a corporation organized under the laws of the State of New York and having a usual place of business in this Commonwealth; and admits that for a long time prior to midnight on July 31, 1918, it had been a public-service corporation doing business in the Commonwealth as a foreign corporation engaged in the business of transmitting intelligence
16 within the Commonwealth by electricity by means of telephone lines, including the operation of all conveniences, appliances, instrumentalities, and equipment utilized in connection therewith and appertaining thereto; but except as in this paragraph of the answer expressly admitted, and except as otherwise stated in paragraph 3 of this answer, denies each and every allegation in said paragraph 2 of the bill of complaint contained, and especially denies in whole and in every part that it is or at any time since midnight of July 31, 1918, has been a public-service corporation doing business in the Commonwealth as a foreign corporation engaged in the business of transmitting intelligence within the Commonwealth by electricity by means of telephone lines, including the operation of all conveniences, appliances, instrumentalities, and equipment utilized in connection therewith and appertaining thereto.

3. Answering the allegations contained in paragraph 3 of the bill of complaint the respondent says that the Congress of the United States, by joint resolution on the 2d day of April, 1917, approved by the President of the United States on the 6th day of April, 1917, formally recognized that a state of war thrust upon the United States by the Imperial German Government existed between the two governments; that at all times since such state of war has existed and still exists; that after such state of war had been declared to exist as aforesaid a joint resolution, of which a copy is annexed to the bill of complaint as Exhibit A, was passed by the Congress of the United States, and on the 16th day of July, 1918, was approved by the President of the United States, and thereupon became and still is of full force and effect, to authorize the President of the United States in time of war to supervise or take possession and assume control of any telephone system or systems, or any part thereof, and to operate the same in such manner as might be needful or desirable for the duration of the war, and to provide just compensation therefor; that thereafter the President of the United States, in his official capacity as such President, by a proclamation, of which a copy, marked "A," is hereto attached and made a part hereof, duly issued by him on July 22, 1918, which proclamation is still in full force and effect and has not been in any respect revoked, cancelled, or modified by the President of the United States, or otherwise, under and by virtue of the powers vested in him by said joint resolution and by virtue of all other powers thereto him enabling, took possession and assumed control and supervision of each and every telephone system and every part thereof within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies, including the entire system
17 and property of every name and nature of the respondent, and directed that the supervision, possession, control

and operation of said telephone systems thereby by him undertaken should be exercised by and through the Postmaster-General of the United States, Albert S. Burleson, and that said Postmaster-General might perform the duties thereby and thereunder imposed upon him, so long and to such an extent and in such manner as said Postmaster-General should determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telephone systems, and that, until and except so far as said Postmaster-General should from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telephone systems should continue the operation thereof in the usual and ordinary course of business by said systems in the names of their respective companies, associations, organizations, owners, or managers, as the case might be, and that from and after twelve o'clock midnight on the 31st day of July, 1918, all telephone systems included in said order and proclamation should conclusively be deemed within the possession and control and under the supervision of said Postmaster-General without further act or notice; that on July 23, 1918, the said Postmaster-General, acting in his official capacity, by order No. 1744, of which a copy, marked "B," is hereto attached and made a part hereof, appointed a committee, of which the said Postmaster-General was and is chairman, for the governmental management, operation, and control of the telephone systems covered by the said proclamation, and that said appointment at all times since has been and still is in full force and effect; that pursuant to the terms and provisions of the said proclamation at midnight of July 31, 1918, supervision, possession, control, and operation of every telephone system and every part thereof within the jurisdiction of the United States, including all the system and property of the respondent, became vested in the President of the United States, and for that purpose and to that end every such telephone system, including the system of the respondent, passed into and within the possession and control and under the supervision of the said Postmaster-General; that at all times since the date last above mentioned said Postmaster-General has had and exercised and now has and exercises supervision, possession, control, and operation of said telephone systems, including the telephone system of the respondent; that on August 1, 1918, said Postmaster-General, acting in his official capacity, issued an order, No. 1783, of which a copy, marked "C," is hereto attached, and made a part hereof, declaring that pursuant to the
18 said proclamation of the President of the United States he had assumed possession, control, and supervision of the telephone systems of the United States, including the telephone system of the respondent, and directing that until further notice the telephone companies, including the respondent, should continue operation in the ordinary course of business through regular channels, and that all officers, operators, and employees of telephone companies, including the respondent, should continue in the performance of their present duties, reporting to the same officers as theretofore, and on the same terms of employment; that at all times since the date last above mentioned under, by virtue

of, and in compliance with, the authority and obligation granted and imposed in and by the aforesaid order No. 1783, the respondents' officers and employees have severally been and now are engaged in the operation of the respondent's telephone system solely as agents, representatives, and instrumentalities of the Government of the United States, acting through the President of the United States and the Postmaster-General, and not otherwise; that by and in consequence of the acts of the Government of the United States hereinabove set forth, the respondent has been divested of all its telephone system and of all its property of every name and description appertaining thereto, and of all power, management, and control of or over the same, except as to the legal title thereto, and subject to the provisions of said joint resolution relative to just compensation, until proclamation shall be made by the President of the United States of the exchange of ratifications of the treaty of peace, unless prior thereto, by order of the Postmaster-General pursuant to the provisions of said proclamation of the President of the United States issued on July 22, 1918, supervision, possession, control, or operation of the respondent's telephone system shall be relinquished in whole or in part to the respondent; that no order has been issued by the Postmaster-General, or otherwise, relinquishing to the respondent in whole or in part the supervision, possession, control, or operation of the respondent's telephone system assumed and exercised by the Government of the United States as aforesaid; that just compensation for the supervision, possession, control, and operation by the Government of the United States of the respondent's telephone system in an amount satisfactory to the respondent was duly determined by the President of the United States pursuant to the provisions of said joint resolution; that a proposal for such just compensation submitted in behalf of the respondent on October 4, 1918, to the Postmaster-General and accepted by him on October 5, 1918, by direction of the President of the United States, was rat-
19 ified by the respondent on October 15, 1918; that at all times since said last-mentioned date said agreement for just compensation entered into by the respondent has been and is now in full force and effect; that said agreement for just compensation fixes and determines the entire compensation to be received by the respondent from midnight of July 31, 1918, to the end of the period of supervision, possession, control, or operation by the Government of the United States; that the amount of compensation fixed and determined by said agreement is not in any respect whatsoever, directly or indirectly, dependent upon, affected by, or related to the financial result of the operation of the respondent's telephone system or of any other telephone system during the period of control by the Government of the United States as aforesaid; that at all times since midnight of July 31, 1918, the respondent has had and now has, and under the aforesaid agreement for just compensation can and will have, no pecuniary interest in the revenues or disbursements or in the profits or losses connected with or resulting from the operation of the respondent's telephone system; that since the date last above mentioned, and until cessation of control by the Government of the United States as hereinabove

set forth, all revenues derived from telephone service rendered in connection with the respondent's telephone system under charges since said date or now in effect, or to be in effect hereafter, have been and will be collected, not in any way for the respondent's own account or benefit, but solely for the Government of the United States, and said revenues have been and will be the property of the Government of the United States, and in no way have been or will become the property of the respondent; and that except as in this paragraph of the answer expressly admitted the respondent denies each and every allegation in said paragraph 3 of the bill of complaint contained.

4. Answering the allegations contained in paragraph 4 of the bill of complaint the respondent says that on December 13, 1918, the Postmaster-General of the United States, acting in his official capacity, under and by virtue of the authority conferred upon him as hereinabove set forth, issued an order, No. 2495, providing that on and after January 21, 1919, the rates for toll service over all the telephone lines and systems under his operation and control as aforesaid, including the line and system of the respondent, should be computed and charged according to a standard schedule set forth in said order; that on December 20, 1918, the respondent mailed to the Secretary of the Public Service Commission a letter, of which a copy, marked "D," is hereto attached and made a part hereof, enclosing a printed copy of said order No. 2495, with which a printed cover sheet was combined, of both of which a copy, marked "E," is hereto attached and made a part hereof; that said letter and said copy of order No. 2495, with said cover sheet above described, were received by the complainants on December 21 1918; that said copy of order No. 2495, with said cover sheet, is the notice referred to in paragraph 4 of the bill of complaint; that the respondent expressly denies that on December 21, 1918, it filed with the Public Service Commission any notice except as in this paragraph of the answer set forth; that the respondent expressly denies that said copy of order No. 2495 was filed with the Public Service Commission under the provisions of St. 1913, c. 784, sec. 20; that said copy of order No. 2495 was filed by the respondent with the Public Service Commission for the information of said Public Service Commission and for no other purpose; that the respondent expressly denies that on December 21, 1918, it filed with the Public Service Commission notice that, effective on January 21, 1919, the respondent proposed to make certain changes in the telephone toll rates and practices to be charged and put into effect by the respondent in accordance with schedules filed together with such notice; that the respondent had and has no interest in, relation to, control over, or connection with the rates and charges fixed and prescribed in said order No. 2495, except as hereinabove set forth, and that its officers and employees have acted and are acting with reference thereto in all matters and in all respects as the agents and instrumentalities of the Government of the United States in the execution of and in compliance with said order of the Postmaster-General of the United States under the circumstances herein described, and not otherwise; that the respondent admits that on January 9,

1919, said Public Service Commission gave notice of a public hearing with reference to the schedules contained in said copy of order No. 2495, to be held on January 17, 1919, but expressly denies that the said Public Service Commission had power, authority, or jurisdiction under or pursuant to the provisions of section 21 of chapter 784 of the Acts of 1913, or otherwise, to take such action; that the respondent admits that a hearing was begun on said last-named date, that a representative of the respondent was present, that the hearing was adjourned to January 30, 1919, and that it was held on said last-named date; that the respondent expressly denies that its representative was fully heard at said time as to the reasonablenese of said rates and changes; that at said time the respondent's representative confined himself to a denial of the jurisdiction of
21 the Public Service Commission in the premises, with the understanding between said Public Service Commission and said representative that if the jurisdiction of the Public Service Commission should be sustained by the Courts, either the Postmaster-General of the United States or the respondent if it should then be in private control, should be entitled without prejudice to a further and full hearing on the merits relative to the rates and changes contained in said order No. 2495; and that except as herein expressly admitted the respondent denies each and every allegation in said paragraph 4 of the bill of complaint contained.

5. Answering the allegation contained in paragraph 5 of the bill of complaint the respondent admits that on January 20, 1919, the complainants issued an order, of which a copy is annexed to the bill of complaint as Exhibit B; that a copy of said order was received by the respondent shortly after four o'clock on the afternoon of January 20, 1919; that on January 31, 1919, the complainants made a report and entered an order, of which report and order a copy is annexed to the bill of complaint as Exhibit C. The respondent expressly denies that said first-named order was an order issued in accordance with the provisions of said section 21, and expressly denies that the complainants had any authority, power, or jurisdiction under said statute, or otherwise, to issue said order, expressly denies that said first-named order had or has any legal effect whatever upon or with reference to the respondent or the Postmaster-General or the President of the United States or the Government of the United States, or any of them, or any person or corporation whatever, expressly denies that the complainants had any authority, power, or jurisdiction under said statute, or otherwise, to make or to enter said report or said last-named order, or either of them, and expressly denies that said report or said last-named order, or either of them, had or has any legal effect whatever upon or with reference to the respondent or the Postmaster-General or the President of the United States or the Government of the United States, or any of them, or any person or corporation whatever. Except as herein expressly admitted, the respondent denies each and every allegation in said paragraph 5 of the bill of complaint contained.

6. Answering the allegations contained in paragraph 6 of the bill of complaint the respondent expressly denies that on January

21, 1919, the respondent itself put into effect the rates stated in said proposed schedules and that the respondent itself is now proceeding to charge the same for all service rendered by it to the public covered by said schedules and that the respondent itself intends to continue to charge said rates. The respondent says that the rates made,
22 established, and, on January 21, 1919, put into effect, were made, established and put into effect solely by the Government of the United States under the provisions of said order No. 2495, and not by the respondent, all as hereinabove set forth, and not otherwise; that the said charges for service are being made by the Government of the United States under the provisions of said order No. 2495 and not by the respondent, all as hereinabove set forth and not otherwise; that said service is being rendered by the Government of the United States through the instrumentality of the respondent's officers and employees and not by the respondent, all as hereinabove described; and that at all times stated in said paragraph 6 of the bill of complaint, now, and until control of the respondent's telephone system by the Government of the United States shall be duly terminated, the respondent has had, has, and will have, no determination of or control over rates charged and to be charged, and no discretion and power with respect thereto, other than to obey the lawful orders of the Postmaster-General of the United States. The respondent admits that it denies the jurisdiction of the complainants to enter said orders or in any other manner to fix or to determine the rates to be charged for telephone service furnished by the respondent's telephone system between points within this Commonwealth until control of the respondent's telephone system by the Government of the United States as hereinabove described shall have duly terminated, and that the respondent claims that said orders are null and void. Except as herein expressly admitted, the respondent denies each and every allegation in said paragraph 6 of the bill of complaint contained.

7. The respondent denies each and every allegation contained in paragraph 7 of the bill of complaint.

8. And further answering the bill of complaint the respondent says upon information and belief that supervision, possession, control, and operation of all telephone systems in the United States, including the telephone lines and system owned by the respondent, were taken and are still held and exercised by the Government of the United States, as hereinabove set forth, as a war measure and under the war powers of the Federal Government, to the end that all such telephone lines and systems within the boundaries of the United States might and should be operated by and as one coordinated and unified national system of wire communication during the period of the war and until the proclamation by the President of the United States of the exchange of the ratifications of the treaty of peace.

23 9. And further answering the bill of complaint the respondent says that all the telephones connected with the lines and system of the respondent, operated and managed by the Government of the United States as aforesaid, have interstate toll connec-

tions, including connections with all telephones of the so-called Bell system, and thereby have available at all times the means of long-distance telephonic communication with the United States at large, and that the rates of toll service prescribed by the Postmaster-General in his said order No. 2495 directly affect and apply to both interstate and intrastate telephone messages and the users thereof.

10. And further answering the bill of complaint the respondent says on information and belief that the action of the President of the United States and of the Postmaster-General of the United States in making and establishing the rates prescribed in said order No. 2495 involved the exercise of judgment and discretion during a war emergency and in carrying out the provisions of a war measure of the Congress of the United States in determining what was needful or desirable for the national security, defense, and welfare in operating the said telephone lines and systems, including those of the respondent, for the duration of the war, and that such exercise of judgment and discretion, and the action taken by the United States and by the respondent as its agent and representative as a result thereof, ought not to be and is not subject to inquiry, review, reversal, or control by this court.

11. And further answering the bill of complaint the respondent says that the United States, the President of the United States, and the Postmaster-General of the United States are, or some one or more of them is, necessary parties or party respondent in this proceeding, and that there is, therefore, a defect of parties respondent in this proceeding.

12. And further answering the bill of complaint the respondent says that it has no personal or corporate interest in the subject-matter of this proceeding; that, though in form against the respondent, this proceeding is in substance and effect against the United States; that the relief prayed for against this respondent will, if granted, in effect restrain the United States, and the President of the United States, and will interfere with and materially affect them, and each of them, in the supervision, possession, control, and operation of the telegraph and telephone lines and systems within the jurisdiction of the United States, including the supervision, possession, control, and operation of the telephone lines and system owned by the respondent; that neither the United States nor the President of
24 the United States nor the Postmaster-General of the United States has consented to be sued or proceeded against in this proceeding nor can be subjected to the judgment, order, decree, or writ sought in this proceeding; and that consequently this Court has no jurisdiction in this proceeding over the United States or the President of the United States or the Postmaster-General of the United States, or over the subject-matter hereof, nor can any effective relief be granted to the complainants herein.

13. And further answering the bill of complaint the respondent says that the facts and subject-matter presented by the bill of complaint, and the issues herein, draw in question a law and statute of the United States and an authority exercised thereunder by the President of the United States and by the Postmaster-General of the United States and by this respondent, and each of them, under

and pursuant to the express orders, commands, and requirements of the United States, and involve a right, privilege, and immunity claimed by them, and each of them, under the Constitution, laws, statutes, and authority of the United States.

14. And further answering the bill of complaint the respondent says that in view of the allegations of this answer it is not now, and at no time since midnight of July 31, 1918, has been, a common carrier as defined in chapter 784 of the Acts of 1913, and amendments thereof and additions thereto, or otherwise a corporation furnishing for public use within the Commonwealth any service within the jurisdiction, or subject to the supervision, of the complainants.

15. And further answering the bill of complaint the respondent says that there are not now existing any laws, statutes, or lawful police regulations of the Commonwealth of Massachusetts affecting, regulating, or controlling the supervision, possession, control, operation, or management of telephone lines and property within said Commonwealth by the United States, or any Federal agency, or by the respondent as an instrumentality of the Government of the United States under the aforesaid joint resolution, proclamation of the President of the United States, and orders of the Postmaster-General of the United States.

16. And further answering the bill of complaint the respondent says that the complainants have not therein alleged facts sufficient to constitute a cause of action, or made or stated such a case as entitles them in a Court of equity to any relief as to the matters contained in said bill of complaint, or any such matters.

25 Wherefore the respondent prays that the bill of complaint be dismissed, with costs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
By POWERS & HALL,
JAMES N. CLARK,
Attorneys.

Filed February 11, 1919.

A.

By the President of the United States of America.

A Proclamation.

Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

That the President, during the continuance of the present war, is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereon, and to operate the same in such manner as may be needful or desirable for the duration

of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code: Provided, further, that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications or the issue of stocks and bonds by such system or systems.

And whereas it is deemed necessary for the national se-
26 curity and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable:

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson. Said Postmaster General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be.

Regular dividends hitherto declared, and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said Postmaster General shall, from time to time, otherwise by general or special orders determine, and, subject to the approval of said Postmaster General, the various telegraph and telephone systems may determine upon and arrange for the renewal and extension of maturing obligations.

By the subsequent order of said Postmaster General supervision, possession, control, or operation, may be relinquished in whole or in part to the owners thereof of any telegraph or telephone system or any part thereof supervision, possession, control, or operation of which is hereby assumed or which may be subsequently assumed in whole or in part hereunder.

27 From and after 12 o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President, in the District of Columbia, this 22nd day of July, in the year of our Lord 1918, and of the independence of the United States the 143d.

[SEAL.] WOODROW WILSON.

By the President:
FRANK L. POLK,
Acting Secretary of State.

B.

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, July 23, 1918.

Order No. 1744.

John C. Koons, First Assistant Postmaster General; David J. Lewis, Commissioner, United States Tariff Commission; and William H. Lamar, Solicitor for the Post Office Department, are hereby appointed a committee for the Governmental management, operation and control of the telegraph and telephone systems covered by the Proclamation of the President dated July 22, 1918, of which committee the Postmaster General shall be chairman.

A. S. BURLESON,
Postmaster General.

C.

Telegraph and Telephone Service.

Bullein No. 2.

OFFICE OF THE POSTMASTER GENERAL.
WASHINGTON, Aug. 1, 1918.

Order No. 1783.

Pursuant to the proclamation of the President of the United States, I have assumed possession, control and supervision of the

telegraph and telephone systems of the United States. This proclamation has already been published and the officers, operators and employees of the various telegraph and telephone companies are acquainted with its terms.

Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service, he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public.

I earnestly request the loyal cooperation of all officers, operators and employees and the public, in order that the service rendered shall not only be maintained at a high standard, but improved wherever possible. It is the purpose to coordinate and unify these services so that they may be operated as a national system with due regard to the interests of the public and the owners of the properties.

No changes will be made until after the most careful consideration of all the facts. When deemed advisable to make changes, due announcement will be made.

A. S. BURLESON,
Postmaster General.

D.

Mr. Andrew A. Highlands, Secretary, Public Service Commission, Commonwealth of Massachusetts, No. 1 Beacon Street, Boston, Mass.

DEAR SIR: We are sending you herewith, in duplicate, basic toll rate schedule No. 1, cancelling and superseding the basic toll rate schedule filed with your Commission on October 18, 1916. This basic schedule is issued in accordance with Telegraph and
29 Telephone Bulletin No. 22, Order No. 2495, of the Postmaster General of the United States, to become effective January 21, 1919.

Will you please acknowledge receipt of this schedule by returning the duplicate copy after stamping thereon the date of receipt?

Respectfully submitted,

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
(Signed) C. F. A. SIEDHOF,
Secretary.

T/J.
Enclosure.

E.

Massachusetts Public Service Commission.

Toll Rate Schedule—No. 1.

(Cancelling and superseding basic toll rate schedule filed October 18, 1916.)

New England Telephone and Telegraph Company.

Basic Toll Rate Schedule.

Issued in accordance with Telegraph and Telephone Bulletin No. 22, Order No. 2495 of the Postmaster General of the United States.

Effective in the Commonwealth of Massachusetts.

Issued December 21, 1918.

Effective January 21, 1919.

[Remainder of Exhibit E is omitted by agreement of counsel.]

—— ——,
Clerk.

Copy.

Attest.

30 [Endorsed:] No. —. Eq. Public Service Commission v. New England Telephone & Telegraph Co. Reservation, &c. Suffolk County.

31 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth at Boston.

MARCH 22, 1919.

In the case of Public Service Commission vs. New England Telephone & Telegraph Company, pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—
Petition dismissed.
By the court,

C. H. COOPER,
Clerk.

March 22, 1919.

Copy.

Attest:

JOHN F. CRONIN,
Clerk.

March 28, 1919.

32 *Brief Statement of the Grounds and Reasons of the Decision.*

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

33 [Endorsed:] 30,455 Eq. No. 1279. Supreme Judicial Court for the Commonwealth. Rescript, Suffolk County. Public Service Commission vs. New England Telephone & Telegraph Company. 7. Suffolk, S. S. Supreme Judicial Court. Filed Mar. 22, 1919. John F. Cronin, Clerk.

34 COMMONWEALTH OF MASSACHUSETTS:
Suffolk, ss:

Supreme Judicial Court.

PUBLIC SERVICE COMMISSION

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Final Decree.

This cause came on to be heard after a rescript from the full Court, and upon consideration thereof, it appearing that the United States is interested therein as a necessary party and that it is thus in substance and effect a suit against the United States, it is Ordered, Adjudged and Decreed that the bill be, and hereby is, dismissed as being for that reason not within the jurisdiction of the court.

By the Court,

JOHN F. CRONIN,
Clerk.

March 28, 1919.

March 28, 1919.
A true copy.
Attest:
JOHN F. CRONIN,
Clerk.

35 COMMONWEALTH OF MASSACHUSSETS:
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the foregoing papers are an exemplification of the record in the case of Public Service Commission, Plaintiff vs. New England Telephone and Telegraph Company, Defendant in said Supreme Judicial Court determined, and attached thereto, and transmitted with said record, is a copy of the opinion of the Supreme Judicial Court recorded therein, attested by the Reporter of Decisions in said Commonwealth.

In testimony whereof I have hereunto set my hand and affixed the seal of this Court at Boston this first day of April, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] JOHN F. CRONIN,
Clerk.

36 COMMONWEALTH OF MASSACHUSETTS.

BOSTON, March 29, 1919.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Public Service Commission vs. New England Tel. & Tel. Company, decided on the 22d day of March, 1919.

HENRY WALTON SWIFT,
Reporter of Decision.

37 RUGG, *C. J.:*

This is a petition in equity brought under St. 1913, c. 784, s. 28, to enforce by injunction an order of the public service commission dated January 20, 1919, relative to toll telephone rates within the Commonwealth. The case comes before us by reservation for determination upon the bill and answer. The case must be considered upon the footing that the averments of the answer are true where in conflict with those of the bill and that the allegations of the bill are true only so far as admitted or not at variance with facts well pleaded in the answer. Perkins v. Nichols, 11 Allen, 542. American Carpet Lining Co. v. Chipman, 146 Mass. 385. The pertinent facts thus ascertained are that prior to July 3, 1918, the defendant was a corporation operating within the Commonwealth an extensive system for the transmission of intelligence by telephone. On July 16, 1918, during the continuance of the great war the Congress of the United
38 States in the exercise of its war powers passed a resolution empowering the President during the war "to supervise or to take possession and assume control of any telegraph, tele-

phone, marine cable or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war." The President exercised the power thus conferred by his proclamation of July 22, 1918. Its relevant provisions were that "I * * * do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies. It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson. Said Postmaster General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems. Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be. * * *

39

From and after 12 o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice." On August 1, 1918, the postmaster general issued a bulletin wherein he declared, "Pursuant to the proclamation of the President of the United States, I have assumed possession, control and supervision of the telegraph and telephone systems of the United States. * * * Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment." The proclamation of the President and the bulletin of the postmaster general have been put into effect and operation according to their terms and are still in force unrevoked and unmodified. The answer avers further that pursuant to this proclamation and bulletin the entire telephone system of the defendant including all its equipment, appurtenances, material, supplies and property of every description has been taken possession of by the government of the United States and is vested in the President and is controlled and operated exclusively by him, and that in consequence

40

thereof the defendant has been divested of all its telephone system and all its property of every kind thereto appertaining and of all power, management and control over the same and retains only the legal title thereto. Just compensation for the supervision, possession, control and operation by the government of the United States of the defendant's telephone system in an amount satisfactory to it has been determined upon and awarded to and accepted by it, and an agreement has been entered into whereby the entire compensation to be received by it from July 31, 1918, to the end of the period of governmental control has been fixed and the amount of such compensation is not in any respect dependent upon the financial result of the operation of its system by the United States government and it has no pecuniary interest in the profits or losses resulting from such operation. The resolution of Congress of July 16, 1918, conferred ample power upon the President to determine the amount of just compensation to be paid to the owner for such possession, supervision, control and operation.

The defendant has pleaded that the United States, the President, the postmaster general or some one or more of them, are necessary parties to this proceeding, and further that the proceeding is in substance against the United States and that the relief prayed for,
which relates exclusively to toll rates for intrastate telephone
41 service, will in effect restrain the United States in its control,
possession and operation of the telephone system belonging to the defendant and formerly operated by it; and that it has not been since July 31, 1918, a common carrier or otherwise furnishing as a corporation any service for public use so as to be subject to the jurisdiction of the public service commission under St., 1913, c. 784.

It is conceded by both parties hereto that the resolution of Congress of July 16, 1918, was a constitutional exercise of the war powers of the federal government and that the proclamation of the President and the bulletin of the postmaster general have been pursuant thereto and are operative according to their terms.

The order of the public service commission here sought to be enforced purported to suspend the taking effect of substantial increases in the rates of toll charges to users of the telephone between places within the Commonwealth, in accordance with a "basic toll rate schedule" issued by an order of the postmaster general of the United States.

It seems manifest from this narration of facts and recital of official documents that the United States is vitally interested and is alone concerned in the toll rates to be collected for telephone service over the system belonging to the defendant. The resolution of Congress of July 16, 1918, is most comprehensive in scope. It authorized the President to take full, complete, absolute and unqualified possession of the defendant's system. It seems to us
42 that the proclamation of the President according to its true
construction was co-extensive in its sweep with the power conferred by the resolution. By express words the President took possession and assumed control of every part of each and every telephone system including all equipment and appurtenances and all materials and supplies. It would be difficult to employ words of

broader reach or wider embrace than those in which the proclamation is couched. The phrase of the bulletin of the postmaster general is equally comprehensive in its grasp. The effect of these documents was not a mere public supervision of an operation by private owners. It was a complete assumption of absolute and complete possession and control to the exclusion of every private interest. No distinction is made by their terms between interstate service and intrastate service. Both alike are taken into the possession of the United States. Powers so extensive as were thus assumed can be exercised only through various governmental agencies. But the right and power of the government are paramount and admit of no associates. In execution of the authority conferred by the resolution of July 16, 1918, just compensation for that which has been taken from the defendant has been awarded by the President and accepted by the defendant. Its interest has come to an end as to the matter of charges to be exacted for the service rendered by the United States for the use of the property of the defendant. The government has utterly supplanted the defendant in this field. The matter of rates is
43 now the sole financial affair of the United States.

The reasonableness and amount of the rates to be charged for intrastate toll telephone service are of direct concern to the United States. As was said in Wells v. Roper, 246 U. S., 335, at 337, "that the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain." In Louisiana v. McAdoo, 234 U. S., 627, at 629 are found these words: "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. Minnesota v. Hitchcock, 185 U. S., 373, 387." These statements but summarize the effect of earlier and exhaustive discussions of the principles applicable to states of facts so similar to those presented in the case at bar as to be indistinguishable. Belknap v. Schild, 161 U. S. 10, and cases there reviewed by Mr. Justice Gray. Louisiana v. Garfield, 211 U. S. 70, 77. Oregon v. Hitchcock, 202 U. S. 60. Naganab v. Hitchcock, 202 U. S., 473. The circumstance that the United States is not the owner of the system of the defendant but only rightfully in possession of it with the right to collect reasonable tolls is immaterial in this connection. "It has a property, a right
44 in rem * * * which, though less extensive than absolute ownership, has the same incident of a right to use." International Postal Supply Co. v. Bruce, 194 U. S., 601, 606.

We think the case at bar is distinguishable from Kaufman v. Lee, 106 U. S. 196, Tindal v. Wesley, 167 U. S. 204, School of Magnetic Healing v. McAnnulty, 187 U. S. 94, Philadelphia Co. v. Stimson, 223 U. S. 605, and similar cases where relief was granted against officers of the United States acting outside of their authority. There is nothing on this record to indicate that the defendant, if and so far as it is an agency of the federal government, upon which we express no opinion, is exceeding the limits of power conferred by the resolution, proclamation and bulletin.

It is a fundamental principle of law that "The United States, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued." Belknap v. Schild, 161 U. S. 10, 16. McArthur Bros. Co. v. Commonwealth, 197 Mass. 137. We are aware of no statute whereby the United States has consented either to become a party to rate fixing proceedings before the public service commission or before this court under St. 1913, c. 784. No such statute has been called to our attention.

It is the contention of the attorney general in behalf of the public service commission that the resolution of Congress of July 16, 1918, reserved to the states the right to regulate intrastate rates to the same extent as that power existed before federal control. That
45 contention is founded upon the final clause of the resolution, which is in these words: "Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such system or systems." That proviso does not seem to us reasonably Government communications, or the issue of stocks and bonds by such system or systems." Thatproviso does not seem to us reasonably susceptible of being stretched by implication to include a consent to be impleaded in the state courts in such a proceeding as this. Such consent is not commonly inferable from such remote and equivocal phrase having direct and adequate reference to another matter. Troy & Greenfield Railroad v. Commonwealth, 127 Mass. 43. Therefore it appears to us unnecessary to consider or discuss the merits of the question whether the proviso of the resolution of July 16, 1918, under its reservation of "lawful police regulations of the several States" "justifies rate regulation by a State in the exercise of its police power," Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 375, because we do not reach it. As was said by Mr. Justice Holmes in Goldberg v. Daniels, 231 U. S. 218, 221, 222, "There is another that comes before it in point of logic. The United States is * * * in possession. * * * It cannot be interefered with behind its back and as it cannot be made a party, this suit must fail."

Petition dismissed.

46 & 47 [Endorsed:] Public Service Commission vs. N. E. Tel. & Tel. Co. Certified Copy of the Opinion of the Supreme Judicial Court.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Judicial Court of the State of Massachusetts, Greeting:

Being informed that there is now pending before you a suit in which Frederick J. Macleod and Everett E. Stone, constituting The Public Service Commission of Massachusetts, are complainants, and New England Telephone & Telegraph Company is defendant, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Judicial Court and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-first day of April, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,043. Supreme Court of the United States, No. 957, October Term, 1918. Frederick J. Macleod et al., constituting The Public Service Commission of Massachusetts, vs. New England Telephone & Telegraph Company. Writ of Certiorari.

Commonwealth of Massachusetts.

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this twenty-sixth day of April in the year one thousand nine hundred and nineteen.

[SEAL.] ARTHUR P. RUGG.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of said Court, hereby certify that the paper attached hereto is a true copy of a Stipulation this day filed in this Court in the case of Frederick J. Macleod, et al., constituting the Public Service Commission of Massachusetts, vs. New England Telephone and Telegraph Company.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-sixth day of April, A. D. 1919.

[SEAL.] JOHN F. CRONIN, *Clerk.*

[Endorsed:] No. —. Frederick J. Macleod, et al., constituting the Public Service Commission of Mass., v. New England Telephone & Telegraph Company. Certificate.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

PUBLIC SERVICE COMMISSION

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Stipulation.

Whereas, in the above-entitled case, a writ of certiorari has been granted by the Supreme Court of the United States for the review by that court of the record and proceedings herein, it is agreed by the parties that the certified transcript of the record on file in the Supreme Court of the United States in connection with the petition for certiorari filed in that court may be taken as the return of the justices of this court to said writ of certiorari.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.
POWERS & HALL,
Attorneys for Respondent.

A true Copy.

Attest:
[SEAL.] JOHN F. CRONIN, *Clerk.*

April 26, 1919.

[Endorsed:] File No. 27,043. Supreme Court U. S. October Term, 1918. Term No. 957. Frederick J. Macleod et al., etc., Petitioners, vs. New England Telephone & Telegraph Company. Writ of certiorari and return. Filed April 28, 1919.

Supreme Court of the United States

OCTOBER TERM, 1918

No. 957

FREDERICK J. MACLEOD AND EVERETT E. STONE

CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

MOTION TO ADVANCE

HENRY C. ATTWILL
Attorney-General

WM. HAROLD HITCHCOCK
Assistant Attorney-General

Supreme Court of the United States

October Term, 1918.

No. 957.

FREDERICK J. MACLEOD AND EVERETT E. STONE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

MOTION TO ADVANCE.

Now come the petitioners in the above-entitled cause and move that, in the event that the petition for certiorari is granted, the case be advanced for hearing, and, if possible, be heard during the present term of the court.

REASONS FOR MOTION.

This case involves the validity of all intrastate telephone toll rates that are now being charged to telephone users in Massachusetts. If these rates are illegal, as the petitioners contend, large sums of money are now being illegally exacted from telephone users in that state for such service. Owing to existing Federal control of the telephone systems of the country,

these sums are now being received by the respondent solely for the account of the United States. No provision has been made for refunding such payments, if they are held to be illegal, and in that event the members of the public who are now being required to make these payments will have no adequate remedy for their recovery. Therefore, any delay in the determination of the issues here involved will be a serious detriment to a very large number of the citizens of Massachusetts.

Though the case at bar involves only rates in Massachusetts, the same rates have been put in force throughout the country and the questions here involved arise in every other state which has established governmental regulation of telephone rates. We are informed that in at least twenty-five of the states suits have been brought, in state or in federal courts, to contest the validity of these rates, and that many of these suits are still pending. Thus, the telephone users of the entire country are interested in the prompt determination of these matters to the same extent as are the citizens of Massachusetts.

Even though governmental control of the telephone systems of the country should cease in the near future, the questions raised in this case will not become moot. If the rates now in question are legal they will remain still in force in Massachusetts until the Public Service Commission has, by full investigation, determined that they are unreasonable and ordered the establishment of a new schedule of rates. If these rates are illegal, the respondent must at once cease to charge them upon the resumption by it of independent control

of its system. If it does not do so, the Public Service Commission will plainly then be warranted in ordering such rates cancelled forthwith without investigation as to their reasonableness. Similar conditions will prevail in many other states; great confusion and much litigation is likely to result from such a situation. It is thus in any event greatly in the interest of the telephone users and the telephone companies of the country that the legality of these rates be determined as speedily as is consistent with the other public duties of this court.

FREDERICK J. MACLEOD,
EVERETT E. STONE,
Public Service Commission of Massachusetts.

By HENRY C. ATTWILL,
Attorney-General.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

The New England Telephone and Telegraph Company acknowledges service of a copy of the above motion to be presented on April 14, 1919, waives further notice thereof, and consents to its presentation upon that date.

JAMES N. CLARK,
Attorney for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1918

No. 957

FREDERICK J. MACLEOD AND EVERETT E. STONE

CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

PETITION FOR WRIT OF CERTIORARI AND BRIEF

HENRY C. ATTWILL
Attorney-General for the Commonwealth of Massachusetts

WM. HAROLD HITCHCOCK
Assistant Attorney-General

SUBJECT INDEX.

LIST OF CASES CITED.

Supreme Court of the United States

October Term, 1918.

No. 957.

FREDERICK J. MACLEOD AND EVERETT E. STONE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Respectfully represents your petitioners, Frederick J. Macleod and Everett E. Stone, as they are the present members of the Public Service Commission of Massachusetts, as follows:

1. On March 28, 1919, the Supreme Judicial Court of Massachusetts, after a rescript from the full court, entered a decree dismissing the petition brought by the Public Service Commission of that state to enforce an order entered by it directed to the New England

Telephone and Telegraph Company, ordering it to cancel certain schedules of telephone rates relating to intrastate toll service put in force by it on January 21, 1919, and requiring it again to put in force the rates for that service existing prior to that date. This order was entered in accordance with authority given to the Commission by the Public Service Commission Act (St. 1913, c. 784, §§ 2, 20, 21), and the petition before the Massachusetts court was a statutory proceeding established for the enforcement of such orders by that act. (St. 1913, c. 784, § 28.)

2. This decree of dismissal was entered solely upon the ground that, as the telephone system of the respondent was now being operated by it on behalf of the United States under the authority of a Joint Resolution of Congress, adopted July 16, 1918, a proclamation of the President dated July 22, 1918, and an order of the Postmaster-General issued August 1, 1918, the United States was financially interested in the suit and a necessary party thereto; that the suit was in substance and effect one against the United States, and, as it had not consented to be sued, the proceeding was not within the jurisdiction of the court.

3. On July 16, 1918, Congress adopted a resolution (see Appendix, p. 47) authorizing the President to take possession and assume control of all telephone and telegraph systems and properties and to operate the same for the duration of the war, such possession and operation not to extend "beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace." That resolution contained the following proviso: —

"*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

By a proclamation dated July 22, 1918, the President, by virtue of the powers vested in him by this resolution, and of all other powers enabling such action, took possession and assumed "control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies." The proclamation provided that such possession and control should be assumed from and after twelve o'clock midnight on July 31, 1918. The proclamation then provided: —

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General, Albert S. Burleson. Said Postmaster-General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster-General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary

course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

On August 1, 1918, the Postmaster-General issued an order announcing that he had "assumed possession, control and supervision of the telegraph and telephone systems of the United States," and directed —

"Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster-General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service, he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public."

Possession and control of the system of the respondent was assumed in accordance with the terms of this proclamation and order. Since August 1, 1918, that system has been operated by the respondent and its officers and employees solely in accordance therewith. The respondent has entered into a contract with the Postmaster-General determining the amount of compensation that it is to receive from the Government of the United States for the use of its properties. The amount thus determined is not in any way affected

by the receipts from the public on account of the operation of its system.

4. On December 13, 1918, the Postmaster-General issued an order providing that on and after January 21, 1919, the rates for toll service over all the telephone lines and systems under his control, and including the lines and systems of the respondent, should be computed and charged according to a standard schedule set forth in the order. Notice of this schedule having been given by the respondent to the Public Service Commission, it held a hearing thereon, and, on January 31, 1919, entered an order directing the respondent "to cancel forthwith the rates and charges stated in" the proposed new schedules, "which rates and charges have been found by the Commission to be unjust and unreasonable." It further ordered the respondent "to put in force and effect forthwith, and hereafter maintain within the Commonwealth of Massachusetts, the rates and charges for telephone toll service which were in effect prior to January 21, 1919, . . . which rates and charges have been found by the Commission to be just and reasonable." The new schedule of rates, involving intrastate toll rates, was put in effect by the respondent on January 21, 1919. It was not cancelled pursuant to this order and still remains in effect. On February 1, 1919, the present suit to enforce this order was filed.

5. The petitioners contend, —

(*a*) That since August 1, 1918, by virtue of the proclamation of the President, and the order of the Postmaster-General made in pursuance thereof, the respondent, New England Telephone and Telegraph Company, through its officers and employees, has

been, and still is, operating the telephone system owned by it but as an instrumentality of the Federal government and subject to its control so far as validly exercised under the Joint Resolution of July 16, 1918.

(*b*) That by virtue of the express terms of the proviso above quoted, contained in the Joint Resolution of July 16, 1918, there was reserved to the states the right to regulate telephone rates during the period of government control to the same extent that such power existed before government control; that, accordingly, it became the duty of all instrumentalities, officers and employees of the United States operating the telephone systems, and particularly of the respondent, as such an instrumentality, to obey an order of the Massachusetts Public Service Commission relating to intrastate telephone rates otherwise valid or which would have been valid if issued before the period of government control.

(*c*) That it was, therefore, within the jurisdiction of the Public Service Commission of Massachusetts, under the Public Service Act of that State, to enter the order in question, and it was within the jurisdiction of the Supreme Judicial Court of Massachusetts, acting within the statutory powers conferred upon it, to enforce that order and to enjoin the respondent as an instrumentality of the Federal government from violating the express provisions of the Joint Resolution of July 16, 1918, imposing upon it the duty of obeying such order; that the proceeding before the Massachusetts court was not in substance or effect a suit against the United States or to which it was a necessary party, but was merely a suit against an instrumentality of the Federal government to enjoin it from

committing an illegal act by violating an act of Congress; that such an act was in effect a tort against every telephone user in Massachusetts and that the respondent was not protected in such violation of law by the direction of the Postmaster-General.

6. The schedule of telephone rates now in question has been put in force by the direction of the Postmaster-General throughout the country. Many claims as to its illegality have been asserted and suits have been brought both in State and Federal courts in many states, at least in twenty-five states, as the petitioners are informed, seeking to restrain the enforcement of these rates. If the contentions of the petitioners are sound, the telephone users of Massachusetts and of the country as a whole are being required to pay for intrastate telephone toll service at rates in excess of the legal rates which have been put in force in violation of the Joint Resolution of Congress. Such telephone users have no adequate remedy by which they may obtain from the United States, or otherwise, reimbursement for such excessive charges.

Wherefore, your petitioners pray that a writ of certiorari be issued out of this court directed to the Supreme Judicial Court of Massachusetts, commanding said court to certify and send to this court a full and complete transcript of the records and proceedings of said Supreme Judicial Court in this case, which was entitled in that court "Public Service Commission *v.* New England Telephone and Telegraph Company," to the end that such case may be reviewed and determined by this court as provided by law; and that your petitioners may have such other and further relief or remedy in the premises as to this court may

seem appropriate; and that said decree of the Supreme Judicial Court of Massachusetts may be reversed by this court.

FREDERICK J. MACLEOD,
EVERETT E. STONE,
Public Service Commission.

By HENRY C. ATTWILL,
Attorney-General.

By WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

COMMONWEALTH OF MASSACHUSETTS.

APRIL 1, 1919.

SUFFOLK, ss.

I, Wm. Harold Hitchcock, being duly sworn, say that I am an assistant attorney-general of the Commonwealth of Massachusetts; that I prepared the foregoing petition, and that the allegations thereof are true as I verily believe.

WM. HAROLD HITCHCOCK.

Subscribed and sworn to this first day of April, before me.

MAX L. LEVENSON,
Notary Public.

Supreme Court of the United States.

October Term, 1918.

No. 957.

FREDERICK J. MACLEOD AND EVERETT E. STONE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, PETITIONERS,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT.

BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI.

INTRODUCTION.

A.

THE QUESTION AT ISSUE IS ONE WITHIN THE CERTIORARI JURISDICTION OF THIS COURT.

This is a petition to bring before this court for review by certiorari a decree of the Supreme Judicial Court of Massachusetts, dismissing a statutory petition brought by the Public Service Commission of that state against the respondent to compel it to obey an

order relating to certain intrastate telephone rates entered January 31, 1918. That order directed it to cancel such rates put in effect on January 21, 1919, at the direction of the Postmaster-General, and to restore the schedule of rates previously in effect.

The respondent pleaded that, by virtue of the existence of Federal control of its telephone system exercised under the Joint Resolution of Congress of July 16, 1918, the proclamation of the President of July 22, 1918, and an order of the Postmaster-General issued August 1, 1918, the United States was a necessary party, and that the suit was in substance and effect one against the United States. The court sustained this plea and entered a decree dismissing the suit as not within its jurisdiction on both of these grounds.

The case is thus one plainly within the jurisdiction of this court to review by certiorari under section 2 of the Act of Congress of September 6, 1916.

1. This decision necessarily involves the validity, under the Joint Resolution of Congress, of the direction of the Postmaster-General to the respondent by virtue of which the rates in question were established without the approval of the Public Service Commission. If this direction was illegal, it did not protect the respondent. Therefore, there was "drawn in question the validity of . . . an authority exercised under the United States," and the decision was in favor of its validity.

2. There was also drawn in question the jurisdiction over this respondent of the Public Service Commission and of the Supreme Judicial Court of Massachusetts, "an authority exercised under any state", as being repugnant to the Constitution of the United States and

the Joint Resolution of Congress, and the decision was against the validity of such authority.

3. An "immunity" from suit under the Constitution of the United States, the Joint Resolution of Congress and the authority of the President and Postmaster-General exercised thereunder was claimed by the respondent and sustained by the state court.

B.

The Case is a Proper One for the Exercise of the Discretion of the Court.

The suit involves the validity of intrastate telephone toll rates put in force in every state in the Union by the Postmaster-General during the period of government control of the telephone systems of the country. Suits have been brought in many of the states, both in Federal and state courts, to restrain the enforcement of these rates. Several of these cases have already reached state courts of last resort, and others will soon be presented to such courts. An original bill in equity is now pending in this court, brought by the State of Kansas against the Postmaster-General, involving similar questions in that state, and it is understood that a case from South Dakota, similar to that presented by this petition, is now pending or is about to be entered in this court on a writ of error.

The fundamental claim in all these cases is that the Joint Resolution of Congress of July 16, 1918, reserved to the states the right of regulating intrastate telephone rates, notwithstanding government control of the telephone systems, to the same extent as that

right existed prior to government control. It is essential to the public welfare that this and all related questions be speedily and finally determined by this court. The case at bar presents those questions in their simplest form, in that resort has been had to all the machinery of state rate regulation in regular course. It involves merely the enforcement of an order of the Public Service Commission which would plainly have been valid before government control.

ARGUMENT OF QUESTIONS AT ISSUE.

The petitioners contend: —

I. That the respondent, through its officers and employees, is now operating the telephone system owned by it as an instrumentality of the Federal government. Therefore, it is a proper party against which a valid order of the Public Service Commission of Massachusetts, relating to intrastate rates in that state, may be directed. Accordingly, it may be required by the Massachusetts Supreme Judicial Court in the exercise of its statutory jurisdiction to obey such an order.

II. The Joint Resolution of July 16, 1918, expressly reserved to the states the right to regulate telephone rates during government control to the same extent as that right existed prior to such control. Therefore, the Commonwealth of Massachusetts had full jurisdiction over the regulation of intrastate telephone rates after and notwithstanding action by the President under the Joint Resolution of July 16, 1918.

III. In view of the provisions of the Joint Resolution of Congress, neither the United States nor the

President nor the Postmaster-General was a necessary party to a suit to enforce an order of the Public Service Commission, directed to the respondent, relating to such rates. Such a suit was not, in substance or effect, one against the United States. It was, therefore, within the jurisdiction of the state court.

IV. The question whether the Public Service Act of Massachusetts is to be interpreted as applying to the respondent, when acting as an instrumentality of the Federal government, is one primarily for the determination of the state court when its jurisdiction has been established. If this court can, and is willing, to deal with it at this stage of these proceedings, it is submitted that it must construe this statute as applicable to the respondent under existing conditions.

We proceed to the discussion of each of these questions.

I.

The Respondent through its Officers and Employees is now operating the Telephone System owned by it as an Instrumentality of the Federal Government.

Prior to midnight July 31, 1918, the respondent was admittedly engaged in operating its telephone system as a public service corporation for the financial benefit of its stockholders. At that time, by virtue of a proclamation dated July 22, 1918, possession and control of all its properties was assumed by the President. It does not appear that any act with reference to these properties, other than the issuing of this proclamation, was performed by or in behalf of the President.

By the proclamation he directed "that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General." He also authorized him to perform the duties imposed upon him "through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems." He directed that, until the Postmaster-General shall order otherwise, "the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

On August first, the Postmaster-General, in announcing that he had taken possession and control of these systems, issued a general order in which he declared that "until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. . . . All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment."

So far as the public was concerned, there was no break or change in the operation and apparent control of the system of the respondent. Its business has been continued in precisely the same general manner as before, in the name of the respondent and through the acts of its officers and employees. In fact, there

appears at no time to have been any actual change in the physical possession of its properties. That has always remained in the corporation. There was nothing which amounted to a seizure by any representative of the United States. All that occurred was that the President formally assumed control of the property and the business of the respondent and entrusted that control to the Postmaster-General. The latter in turn directed that "the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels."

In other words, what was done, both in Massachusetts and throughout the country, was merely to assume control of the companies and through them of the properties, business and employees. The companies were required thereafter to operate in the interest of the Federal government and subject to the orders of the Postmaster-General. In fact, the government took possession of these systems merely by making the corporations owning and operating them its agents. Their possession continued as before, but, on and after August first, that possession was in behalf of the government as its agents.

This is expressly conceded by Mr. Lamar, Solicitor of the Post Office Department, and one of the committee appointed by the Postmaster-General for the Government operation of the telephone systems. In a letter dated January 15, 1919, addressed to one of the petitioners, (See Bill of Complaint, Exhibit B, Appendix C.), he uses this expression, "the New England Company, which, as you are aware, is now and ever since August 1, 1918, *has been operating its properties for the account of the Government* and not for the benefit of its

stockholders." This statement of the legal advisor of the Postmaster-General is utterly inconsistent with any theory that the respondent corporate entity is not still actually operating its system through its officers and employees.

It is obvious that there were no other practical means by which the problem could be handled without serious interruption in the business of these companies. Vast bodies of officers and employees could not be transferred from the service of these companies to the direct service of the United States without their consent. They must continue to be officers and employees of these corporations as before and subject to the direction of their superiors in the service of the corporations. Only in this way could these huge systems be taken over as complete going concerns. The directors, officers and employees of each of these companies stood in no relation whatever to each other except through their mutual relationships to the corporation. To destroy those relationships and to attempt to force upon these employees a direct relationship to the Federal government would have meant a complete disruption of these systems.

Thus the only thing that happened on August first was that the telephone companies ceased to be independent corporations, conducting their own systems for their own financial benefit, and thereafter, though still having the legal title to and the actual possession of their properties, became instrumentalities of the Federal government, exercising their corporate functions, holding and operating their properties and controlling their officers and employees solely as such instrumentalities. They now are subject to the direction of the President

and the Postmaster-General and conduct their systems for the financial benefit of the government. They are paid by the government for the use of their properties and for their services in operating them for the government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the Joint Resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed. It is the respondent, through its corporate machinery, that has established and is charging in Massachusetts these new rates. To be sure, it is doing so at the order of the Postmaster-General and not in the exercise of any independent judgment on the part of its officers, but it is doing so by the exercise of its corporate powers and through its control over its employees. It would not be possible for the Public Service Commission to choose any officer or employee of the respondent against whom it might direct its order with any assurance that it was within his power to cause it to be obeyed. Any injunction against the respondent, however, binds all its officers and employees and requires them to exercise the powers of the corporation to bring about obedience to it.

Doubtless, the respondent may find itself in a position where it will be required to choose between obeying a decree of this court and carrying out an illegal order of the Postmaster-General. An alternative of that character, however, is always possible when a superior officer, public or otherwise, seeks to require a subordinate to perform an illegal act. In the case at bar, it cannot be assumed that, when that illegality

has been demonstrated, the Postmaster-General will continue to insist upon his order. Even if that should occur, it would not in any way excuse this respondent from the consequences of its illegal act.

II.

Jurisdiction of Massachusetts over the Regulation of Intrastate Telephone Rates after Action by the President under Joint Resolution of July 16, 1918.

There can be no question as to the power of the Commonwealth to regulate, within constitutional limitations, the rates to be charged by telephone companies for service rendered by them within the State. Such companies are conducting a business charged with a public interest which is as much subject to such regulation as is the business of a railroad.

> Western Union Telegraph Co. *v.* Foster, 224 Mass. 365, 372.
> Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14.

Admittedly, the Joint Resolution of Congress under which the President took control of these systems and properties was passed under the war powers of Congress. Unquestionably those powers must be given the widest scope required by the emergency which called them into action. Congress undoubtedly had the power to authorize, or even to require, the taking over of the telegraph and telephone systems of the country by the Federal government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of Federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers.

Obviously, Congress could not authorize the taking of these systems by the Federal government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a state as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *à fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the admitted purpose of the establishment of the rates in question. Such action seems to go beyond the scope even of the far-reaching war powers.

However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the states should be interfered with as little as possible. The resolution as originally drafted, and finally enacted, contained this express reservation to the states: —

> "*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

This is an express enactment that action by the President under the resolution shall not "amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States," except to the extent that such regulations may affect the transmission of government messages or the issue of stocks and bonds by the companies whose properties have been taken.

The question now before the court turns entirely upon the interpretation to be given this proviso. Did Congress intend by it to reserve to the states the right to enforce existing statutory regulations for the determination of telegraph and telephone rates? If so, the only question that remains concerns the manner in which this reserved power shall be exercised.

"Lawful police regulations" can only mean regula-

tions established in the lawful exercise of the police power.

Chicago, Burlington & Quincy R.R. *v.* Illinois, 200 U. S. 56.
Railroad Co. *v.* Fuller, 84 U. S. 560, 568.

That power is not restricted as to the regulation of matters connected with the public health, safety or morals, but extends to everything which concerns the public convenience and the general welfare.

Sligh *v.* Kirkwood, 237 U. S. 52, 59.
German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.
Eubank *v.* Richmond, 226 U. S. 137, 142.

The Constitution of Massachusetts (Pt. II., c. I., Art. IV.) grants to the General Court full power and authority "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." The power thus granted and defined has long been recognized as the police power.

Commonwealth *v.* Alger, 7 Cush. 53, 85
Commonwealth *v.* Danziger, 176 Mass. 290, 291.

In Commonwealth *v.* Alger, Shaw, C.J., said:—

"We think it is a settled principle, growing out of the nature of well ordered civil society that every holder of prop-

erty, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

In that case the defendant was the owner in fee to low water mark of certain lands bordering upon Boston harbor, subject, however, to the public rights of navigation and fishing. The establishment of a harbor line by the Commonwealth, by which the defendant was forbidden to build a wharf beyond that line and to the full extent of his ownership, was sustained solely under

the police power. This general principle was laid down as governing the application of that power: —

> "Whenever there is a general right on the part of the public, and a general duty on the part of a land owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." (Page 95.)

This principle extends to all cases where property is charged with a public interest. The police power is the power which is employed to define with precision the extent of that interest and to regulate the conflicting rights and duties of the individual and the public.

It is precisely this principle that is applied in the regulation of the rates to be established by persons engaged in a business which is held to be charged with a public interest. Upon such persons the duty is imposed of conducting their business and the property devoted to it so as not to impose upon the public which they serve an unreasonable burden for their service. This common-law duty to make only reasonable charges being established, resort must be had to the police power whenever it is desired more clearly to define what charge is reasonable or to establish a method for readily determining that question.

Thus when, in Munn *v.* Illinois, 94 U. S. 113, this court had before it the question of the validity of a state statute fixing maximum charges for the storage of grain, that court at once recognized that it was dealing with the limits of the police power of the states. It approached the question precisely as did Chief Justice Shaw in Commonwealth *v.* Alger, referring

even to the same passages from Lord Hale. In general definition of the power, the court said: —

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." (Page 124.)

It was pointed out that the police power may be thus exercised to regulate rates and charges only in the case of a business or calling which is charged with a public interest. Thus it was recognized to be applicable to the regulation of the rates of common carriers and was held to apply to the similar regulation of public warehousemen.

Since this case and the companion cases in the same volume relating to the regulation of railroad rates, it has never been doubted that it was within the power of the States to fix reasonable rates to be charged by common carriers for purely intrastate service. It has seldom since been necessary to state the precise source of that power. The court has been rather concerned with the manner of its exercise. It has, however, in no way modified the fundamental reasoning of Munn *v.* Illinois, and has frequently recognized that, in cases of this character, it was merely dealing with the limits of the police powers of the states.

Minnesota Rate Cases, 230 U. S. 352.
German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.
Atchison, Topeka & Santa Fé Ry. Co. *v.* Vosberg, 238 U. S. 56, 59.
Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574, 578, 579.

The language of the proviso of the Joint Resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the states show the breadth of that reservation. Neither "the transmis-

sion of Government communications" nor the "issue of stocks and bonds" is a matter that would be ordinarily affected by regulation in the interest of the public health, safety or morals. In fact, the chief if not the only ground for the regulation of the issue of stocks and bonds by carriers or other public service corporations is the close connection between such issues and the rates to be charged by these corporations for their service to the public. Such rates may in general be charged as will give a fair return on invested capital. States attempt to control the issue of stocks and bonds largely to make sure that those issues fairly represent property actually and properly invested in the business, in order to protect the public from paying rates based upon improper investments or an inflated capital.

Thus, the control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless. Its inclusion in the resolution plainly shows that these words were intentionally used in their broad sense and included the regulation of telegraph and telephone rates to the extent that the states already possessed such power.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear that, to the extent that the public is to be permitted to use them as before, the regulative powers of the states should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government mes-

sages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

The history of the Joint Resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion. The resolution appears to have been introduced in Congress in precisely the same form in which it was enacted. Various attempts were made to amend it in the Senate, but they were unsuccessful. It is the previous history of the language of the proviso that is important. This language was taken, with only one change made necessary by the different subject matter of the resolution, from the statute approved March 21, 1918, for the operation of the railroad systems under Federal control. Section 15 of that act is as follows: —

> "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

As the Joint Resolution and this statute are dealing with problems of precisely the same character, namely, the manner of operation under Federal control of great systems of communication, previously subject in part to state regulation, it is obvious that the language of the proviso and of this section must be regarded as having been used with precisely the same meaning. The history of section 15 of the Railroad Control Act is in fact the history of the proviso of the Joint Resolution.

No portion of section 15 was contained in the bill as originally drafted. Subsequently in the House, the following clause was inserted: "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws of the States in relation to taxation." The same words were inserted in the Senate bill on February 21, 1918, by amendment. (56 Cong. Rec., p. 2445.)

On February 28, 1918, the following amendment, inserted at the end of the clause just quoted, was accepted by the committee and agreed to by the House: —

"or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds." (56 Cong. Rec., p. 2820.)

It was later authoritatively stated on the floor of the House by Chairman Sims, of the committee having the bill in charge, that these words "have reference to the police powers of the States." (56 Cong. Rec., p. 3498.)

It is plain that if that section had been finally adopted in this form no claim could be made that the powers of the states to regulate railroad rates had been reserved to them. It would be clear from the language of the exception that any police regulations affecting the control of rates would have been excepted from the reservation.

The insertion of this exception relating to the regulation of rates clearly establishes that the broad term

"the lawful police regulations of the several States", as used in this clause, was regarded as including all matters of rate regulation within the power of the States. The insertion of the exception is conclusive upon this point.

It is obvious, however, that if the bill had been left in this form, the reservation to the states to enforce police regulations would have been a mere shadow, for the subjects excepted embrace the most important of the powers exercised over railroads by the states under their police powers. Recognizing this and with the obvious intention of permitting far less interference with the rights of the states, the words "the regulation of rates, the expenditures of revenues, the addition to or improvement of properties" were struck out as a result of a conference between committees of the Senate and of the House in the final stages of the bill. (56 Cong. Rec., pp. 3241, 3420, 3435, 3443, 3500.) The only conclusion which can be drawn from this action is that the extent of the reservation of powers to the states was carefully considered at the final stages of this bill and that, by this amendment, a clear intention was expressed to reserve to the states their powers of rate regulation.

When there came before Congress the matter of providing for the extension of Federal control from the railroads to the telegraph and telephone systems, it was but natural that the same general policy with relation to the preservation of the powers of the states should be adopted. Thus Congress turned to the provision which it had carefully worked out but four months before with reference to the railroads. It adopted that provision without change and it must be

said to have adopted it with a full appreciation of the meaning so plainly given to it by its history.

Of course, the railroad control act contained more detailed machinery than the Joint Resolution for dealing with the matter of rates, but it contained no provision in any wise inconsistent with section 15 as above interpreted. Even though some of the provisions of that act might be thought somewhat to modify section 15, no such modification can be found in the Joint Resolution under consideration. In that resolution there is no provision whatever, other than that under consideration, having the remotest bearing upon the matter of rate regulation. The proviso must therefore be given its full meaning as disclosed by its plain language read in the light of the history of that language.

Accordingly, the Public Service Commission of Massachusetts submits that the Joint Resolution of Congress, under which the telephone system of the respondent was taken over by the Federal Government and under which it is now being operated, must be interpreted as expressly reserving to that state the same powers with reference to the regulation of the rates to be charged for communication between points within it upon the system of the respondent that it had before the period of Federal control.

III.

This Suit is not beyond the Jurisdiction of the Massachusetts Court on the Ground that the United States is a Necessary Party or that the Suit is in Effect against the United States.

This proceeding is not a suit against the President or against the Postmaster-General. No process or injunction is sought against either. There is no occasion to determine whether it would be within the power of this court to enjoin the Postmaster-General, if he were found within the State, from disobeying the order of the Public Service Commission in violation of the limitations on his authority imposed by the Joint Resolution.

Here the suit is directed, and an injunction is sought, merely against a corporation which, until July 31, 1918, was admittedly subject to all the processes of this court, but which is now acting as an instrumentality of the Federal Government. Doubtless, to the extent that it is acting in accordance with valid Federal authority, and to the extent that it is obeying the valid orders of the Postmaster-General, it cannot be restrained by any court. But it can derive no protection from an order, either of the President or the Postmaster-General, which is in violation of their authority under the Joint Resolution. The respondent is bound by no duty to disobey the Act of Congress merely because the Postmaster-General so directs.

The question of the extent of the exemption of Federal agencies from state interference has been frequently considered by this court.

In National Bank *v.* Commonwealth, 9 Wall. 353, in sustaining the right of a State to require a national bank to pay, in the first instance and on account of its shareholders, a tax assessed upon its shares (*Cf.* St. 1909, c. 490, pt. III., §§ 11–13) the court, at pages 361, 362, said: —

> "The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency, in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

Similar questions have arisen with reference to the jurisdiction of states over railroads incorporated by Act of Congress, especially in the case of the Union Pacific Railroad, which was, by an act approved July 1, 1862, in the midst of the Civil War, created for the purpose, frequently reiterated in that act, "of aiding in the construction of said railroad and telegraph line, and to secure a safe and speedy transportation of the mails, troops, munitions of war and the public stores thereon."

In Railroad Company *v.* Peniston, 18 Wall. 5, it was recognized that the Union Pacific Railroad was an agent of the Federal government and that Congress might interpose to protect it from state taxation. In the absence of such action it was held that a tax upon its property was valid.

In Union Pacific Railway Company *v.* Burlington & Missouri River Railroad Company, 3 Fed. 106, the power of the states to regulate the crossing and connection of railroads, and in Union Pacific Railway Company *v.* Leavenworth N. & S. R. Co., 29 Fed. 728, the power of eminent domain of the states, were held applicable to this Federal corporate agency.

In Smyth *v.* Ames, 169 U. S. 466, it was contended that the Union Pacific Railroad was not within the reach of the rate regulating power of any state by reason of the provisions of the Act of Congress of July 1, 1862, creating it. The court made the following answer to this contention (p. 521): —

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the

rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

A similar result had previously been reached as to another railroad of Federal incorporation in Reagan *v.* Mercantile Trust Co., 154 U. S. 413.

In none of these cases is there the least suggestion, even from the parties seeking to impeach the rights of the states to tax or to regulate, that those powers when once conceded to the states by Congress could not be enforced by all valid legal processes against these corporate governmental agencies.

An officer of an agent of the United States is not protected from the legal consequences of his acts or from judicial processes establishing those consequences, even by the fact that he is acting under the color of an express order of the President. If that order for any reason is invalid, the officer may be held liable to pay the damages caused by his act.

Little *v.* Barreme, 2 Cranch, 170.
Belknap *v.* Schild, 161 U. S. 18.

Possession of real property held by him in behalf of the United States and in assertion of its authority may be taken from him by ejectment proceedings.

United States *v.* Lee, 106 U. S. 196.
Tindal *v.* Wesley, 167 U. S. 204.

And the injunctive processes of a court of equity may be employed to restrain him from acting in violation or excess of his authority.

Philadelphia Co. *v.* Stimson, 223 U. S. 605, 620.
School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94.
Noble *v.* Union River Logging Railroad Co., 147 U. S. 164.

In Philadelphia Co. *v.* Stimson, although an injunction was sought against the respondent as a Cabinet officer, the court thus put one side the question of its jurisdiction over him: —

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

As against State officers, the principle under discussion has been frequently recognized by this court in sustaining the jurisdiction of the Federal courts to en-

join such officers from acting under the authority of unconstitutional State statutes.

Smyth *v.* Ames, 169 U. S. 466.
Ex parte Young, 209 U. S. 123.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499, 506.
Cavanaugh *v.* Looney, 248 U. S. 453, 456.

Similarly, those courts will enjoin acts in violation of the Federal Constitution done by State officers in ostensible enforcement of valid State statutes, on the ground that such acts are in excess of the officers' authority and thus not the acts of the State; that is, they will enjoin the unconstitutional administration by State officials of valid State statutes.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362.
Raymond *v.* Chicago Traction Co., 207 U. S. 20.
Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499.

The case at bar is closely analogous to these two groups of cases. In those cases, though no suit could be brought against the state, jurisdiction is assumed to restrain a public officer from collecting taxes for the benefit of the state, when the authority under which he is purporting to act is either invalid or does not warrant his attempted action. In the case at bar the claim is that an instrumentality of the United States is attempting to collect telephone rates from

citizens of Massachusetts in violation of the express terms of its authority to act for the United States. In both classes of cases the officer or governmental instrumentality is purporting to act solely for the benefit of the government which he represents. An injunction has the effect of depriving that government of money which it would otherwise receive. After it has actually received it, there is obviously no remedy in the absence of its consent to be sued. But the cases relied upon plainly recognize jurisdiction to prevent public officers or instrumentalities from exacting from the public illegal payments, even though all sums collected are to go into the public treasury.

The cases relied upon by the state court come within an entirely different class. Most of them, including the various cases against the Secretary of the Interior, involve the title to land whose ownership is claimed by the United States. Others, like Belknap *v.* Schild, 161 U. S. 10, and International Postal Supply Co. *v.* Bruce, 194 U. S. 601, involve the right to use property owned by the United States. In such cases, to issue an injunction restraining use of the property by a public officer would be in effect to enjoin the United States from using its own property. Wells *v.* Roper, 246 U. S. 335, was an attempt to enforce specific performance of a contract of the United States by a bill to restrain a public officer from cancelling it. To grant this relief would have been in effect to require the United States to perform its contract. The case of Louisiana *v.* McAdoo, 234 U. S. 627, was an attempt to review the official acts of the Secretary of the Treasury in the enforcement of the customs laws. No one of these cases is in any way comparable to the tax cases above referred to or to the case at bar. In

no one of them was there any claim that a public officer was threatening to require the complainant to make payments into the public treasury which were in violation of law.

The Joint Resolution, interpreted as reserving to the States the power to regulate rates, is in effect a direction by Congress to every Federal officer connected with the operation of the telephone systems and to every instrumentality, corporate or otherwise, employed in that operation, to obey all valid assertions of that power by state authorities. The failure of the respondent as a Federal agency to conform to that direction of Congress is plainly an act in excess of the authority granted it by the Federal government. It is not protected by its abuse of power even by the orders of the Postmaster-General. He, too, would be equally within the reach of the injunction of the state court, if he was personally within its territorial jurisdiction.

If the Joint Resolution or the action of the President under it were unconstitutional, it would plainly follow that the present proceeding would not be a suit against the United States. In that event it would unquestionably be within the jurisdiction of the state court to restrain the respondent from the commission of an illegal act. It can be none the less so, when the ground of the suit is not that Congress has attempted and failed to grant the authority relied upon, but that it has expressly withheld it.

Accordingly, it is submitted that it was within the power of Massachusetts court by proper decree and process to require the respondent, even as a Federal instrumentality to obey all valid orders of the Public Service Commission directed against it.

IV.

The Public Service Commission is authorized by Existing Statutes of the Commonwealth to enforce the Power reserved to the States by the Joint Resolution.

The Public Service Act (St. 1913, c. 784, § 2) establishes the authority of the Commission in part as follows: —

"Section 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto."

Sections 20, 21 and 22 (see Appendix), dealing with the regulation of rates for service, apply to "every common carrier" (§ 20) as defined in section 2.

Plainly, the respondent is furnishing and rendering "for public use within the commonwealth" the service described in section 2 (c). It is, therefore, a common

carrier as defined in section 2, and thus brought within the jurisdiction of the Commission.

To be sure, it is now rendering that service solely as an instrumentality of the Federal Government, but it is still a corporation within the jurisdiction of the Commonwealth. It is still within the power of the Commonwealth, by the express terms of the Joint Resolution, to tax the respondent under St. 1909, c. 490, pt. III., §§ 40–43. Without permission of the Federal Government, doubtless this could not be done. But there is no question but that taxes may be imposed upon such corporate instrumentalities by the states when Congress so authorizes. Such an authority of limited scope has long been in existence as to national banks.

U. S. Rev. Stat., § 5219.
Van Allen *v.* Assessors, 3 Wall. 573.
Mercantile Bank *v.* New York, 121 U. S. 138.
Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 667.
Bank of California *v.* Richardson, 248 U. S. 476, 483.

Therefore, construing the Joint Resolution as reserving to the States the power to regulate intrastate rates, and as the provisions of the Public Service Act are plainly applicable to every corporation furnishing telephone service for the public within the Commonwealth under any circumstance, those provisions must be held applicable to the respondent, even though it is a government instrumentality. This statute would still in terms apply to the respondent without the reservation in the Joint Resolution, but doubtless in that

case it could not be enforced against it while such an instrumentality. If Congress has consented that there shall be no immunity from State regulation on this ground, the plain terms of the statute necessarily apply.

Then the reservation in the resolution is not merely of the police *powers* of the states. In such a form it might be argued that it called for definite exercise of those powers directly against this government instrumentality. The resolution provided "that nothing in this Act shall be construed to amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States." This is a definite declaration that all lawful police regulations then in force or thereafter to be enacted shall not be affected by the action of the President under the authority given him by the resolution. It plainly indicates an intention both to leave in full force *existing police regulations* and also to subject these systems in the Federal control to any future regulation that may be validly enacted.

It is submitted that it cannot be successfully contended that the respondent in its present status does not come within the reach of the powers granted to the Public Service Commission by the Public Service Act.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General for the Commonwealth of Massachusetts.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

APPENDIX.

Mass. St. 1913, c. 784 (The Public Service Act), provides: —

SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto.

. . . . . .

SECTION 20. Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the commission may order. In the case of common carriers the

forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the interstate commerce commission. No common carrier shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the commission shall order, to be given prior to the time fixed in such notice to the commission, for the changes to take effect. The commission for good cause shown may allow changes without requiring the thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and filed, as the commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation

from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: *provided, however*, that when any such contract or contracts are or become terminable by notice, the commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph or telephone corporation as and when directed by such order.

SECTION 21. Whenever the commission receives notice of any change or changes proposed to be made in any schedule filed under the provisions of this act, it shall have power, either upon complaint or upon its own motion, and after notice, to hold a public hearing and make investigation as to the propriety of such proposed change or changes. Pending any such investigation and the decision thereon, the commission shall have power, by any order served upon the common carrier affected, to suspend the taking effect of such change or changes, but not for a longer period than six months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation, the commission may make such order in reference to any new rate, joint rate, fare, telephone rental, toll, classification, charge, rule, regulation or form of contract or agreement proposed, as would be proper in a proceeding initiated after the same has taken effect. At any such hearing involving any proposed increase in any rate, joint rate, fare, telephone rental, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the common carrier. If at a hearing involving any proposed decrease in any rate, joint rate, fare, telephone rental, toll or charge demanded by any common carrier, it shall appear to the

commission that the said rate, joint rate, fare, telephone rental, toll or charge is insufficient to yield reasonable compensation for the service rendered, the commission shall have power to determine what will be the just and reasonable rate or rates, fare or fares, telephone rental or rentals, toll or tolls, charge or charges, to be thereafter observed in such case as the minimum to be charged, and to make an order that the common carrier complained of shall not thereafter demand, charge or collect any rate, fare, telephone rental, toll, or charge lower than the minimum so prescribed without first obtaining the consent of the commission, not to be given without a public hearing.

SECTION 22. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges or any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the com-

mission such authorization is consistent with the public interests, and the commission may from time to time modify or revoke such authorization.

. . . . . .

SECTION 27. The supreme judicial court shall have jurisdiction in equity to review, annul, modify or amend any rulings or orders of the commission which are unlawful to the extent only of such unlawfulness. The procedure before the said court shall be that prescribed by its rules, which shall state upon what terms the enforcement of the order shall be stayed. The attorney for any party petitioning the supreme judicial court hereunder shall file with the clerk of the court a certificate that he is of opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. The burden of proof shall be upon the party adverse to the commission to show that its order is invalid. Any proceeding in any court of this commonwealth directly affecting an order of the commission or to which the commission is a party shall have preference over all other civil proceedings pending in such court, except election cases.

SECTION 28. The supreme judicial court shall have jurisdiction upon the application of the commission to enforce all valid orders of the commission and all the provisions of this act. Whenever the commission shall be of opinion that a common carrier subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of the law or of any order of the commission, it shall direct counsel to the commission to begin, subject to the supervision of the attorney-

general, an action or proceeding in the supreme judicial court in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

Joint Resolution of Congress of July 16, 1918.

To authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *provided,* That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph

twenty, and section one hundred and forty-five of the Judicial Code: *provided, further,* That *nothing in this Act shall be construed to amend, repeal, impair, or affect* existing laws or powers of the States in relation to taxation or *the lawful police regulations of the several States,* except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

Supreme Court of the United States

OCTOBER TERM, 1918

No. 937

FREDERICK J. MACLEOD and EVERETT E. STONE,
CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

v.

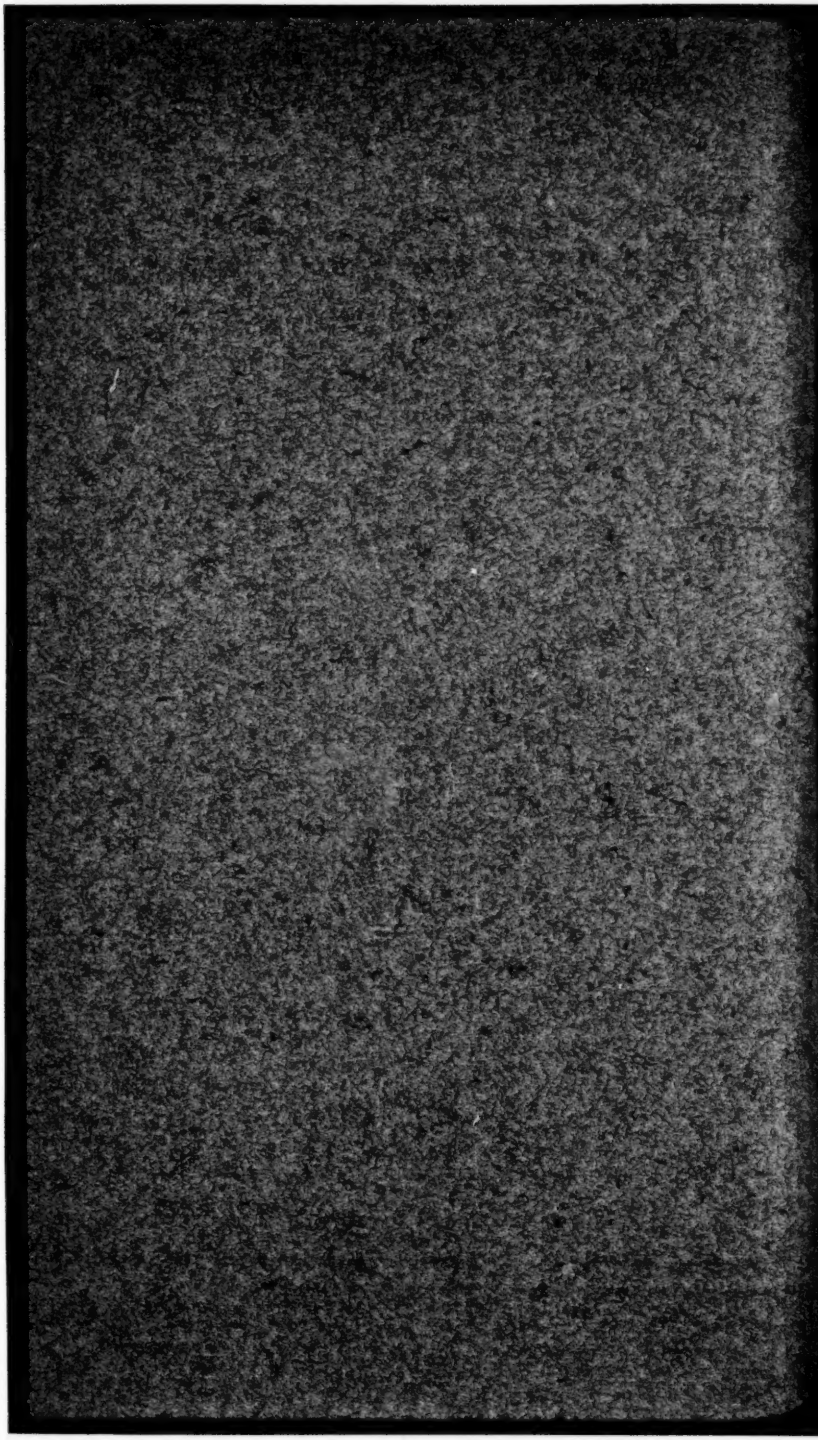
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR PETITIONERS

HENRY C. ATTWILL
Attorney General for the Commonwealth

WM. HAROLD HITCHCOCK
Assistant Attorney General



Supreme Court of the United States

OCTOBER TERM, 1918

No. 957

FREDERICK J. MACLEOD AND EVERETT E. STONE

CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

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Assistant Attorney-General

SUBJECT INDEX.

LIST OF CASES CITED.

Supreme Court of the United States

October Term, 1918.

No. 957.

FREDERICK J. MACLEOD AND EVERETT E. STONE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, PETITIONERS,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT.

BRIEF FOR PETITIONERS.

NATURE OF CASE.

This is a petition to review by certiorari a decree of the Supreme Judicial Court of Massachusetts dismissing a statutory petition (St. 1913, c. 784, §28, Appendix, p. 43) brought by the Public Service Commission of that State against the respondent to compel it to obey an order of the Commission relating to certain intrastate telephone toll rates entered January 31, 1918. That order directed the respondent to cancel rates put in effect on January 21, 1919, at

the direction of the Postmaster-General, and to restore the schedule of rates previously in effect. (Record, p. 9.)

A preliminary order granting the writ of certiorari was entered by this court on April 21, 1919, and the case then advanced for argument and assigned for hearing on May 5, 1919. By stipulation of the parties, the transcript of the record upon the petition for the unit is to be taken as the return thereto.

In the state court the case was heard upon the allegations of the petition and the answer. In accordance with the local practice the case was there considered "upon the footing that the averments of the answer are true where in conflict with those of the bill and that the allegations of the bill are true only so far as admitted or not at variance with the facts well pleaded in the answer." (Record, p. 26.) Among other defenses the respondent pleaded (Record, p. 19, par. 11, 12) that, by virtue of the existence of Federal control of its telephone system exercised under the Joint Resolution of Congress of July 16, 1918, the proclamation of the President of July 22, 1918, and an order of the Postmaster-General issued August 1, 1918, the United States was a necessary party, and that the suit was in substance and effect one against the United States. The court sustained this plea and entered a decree dismissing the suit as not within its jurisdiction on both of these grounds. (Record, p. 25.) No other questions involved in the case were considered by it.

FACTS INVOLVED.

On July 16, 1918, Congress adopted a resolution (see Appendix, p. 44) authorizing the President to take possession and assume control of all telephone and telegraph systems and properties and to operate the same for the duration of the war, such possession and operation not to extend "beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace." That resolution contained the following proviso: —

> "*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

By a proclamation dated July 22, 1918, (Record, p. 20) the President, by virtue of the powers vested in him by this resolution, and of all other powers enabling such action, took possession and assumed "control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies." The proclamation provided that such possession and control should be assumed from and after twelve o'clock midnight on July 31, 1918. The proclamation then provided: —

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General, Albert S. Burleson. Said Postmaster-General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster-General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

On August 1, 1918, the Postmaster-General issued an order (Record, p. 22) announcing that he had "assumed possession, control and supervision of the telegraph and telephone systems of the United States," and directed —

"Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster-General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to

leave the service, he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public."

Possession and control of the system of the respondent was assumed in accordance with the terms of this proclamation and order. Since August 1, 1918, that system has been operated by the respondent and its officers and employees solely in accordance therewith. The respondent has entered into a contract with the Postmaster-General determining the amount of compensation that it is to receive from the Government of the United States for the use of its properties. The amount thus determined is not in any way affected by the receipts from the public on account of the operation of its system.

On December 13, 1918, the Postmaster-General issued an order providing that on and after January 21, 1919, the rates for toll service over all the telephone lines and systems under his control, and including the lines and systems of the respondent, should be computed and charged according to a standard schedule set forth in the order. (Record, p. 16.) Notice of this schedule having been given by the respondent to the Public Service Commission, it held a hearing thereon, and, on January 31, 1919, entered an order directing the respondent "to cancel forthwith the rates and charges stated in" the proposed new schedules, "which rates and charges have been found by the Commission to be unjust and unreasonable." It further ordered the respondent "to put in force and effect forthwith, and hereafter maintain within the Commonwealth of Massachusetts, the rates and charges

for telephone toll service which were in effect prior to January 21, 1919, . . . which rates and charges have been found by the Commission to be just and reasonable." (Record, pp. 8, 17.) The new schedule of rates, involving intrastate toll rates, was put in effect by the respondent on January 21, 1919. It was not cancelled pursuant to this order and still remains in effect. (Record, p. 18.) On February 1, 1919, the present suit to enforce this order was filed. (Record, p. 3.)

QUESTIONS AT ISSUE.

The petitioners contend: —

I. The respondent, through its officers and employees, is now operating the telephone system owned by it as an instrumentality of the Federal government. Therefore, it is a proper party against which a valid order of the Public Service Commission of Massachusetts, relating to intrastate rates in that state, may be directed. Accordingly, it may be required by the Massachusetts Supreme Judicial Court in the exercise of its statutory jurisdiction to obey such an order.

II. The Joint Resolution of July 16, 1918, expressly reserved to the states the right to regulate telephone rates during government control to the same extent as that right existed prior to such control. Therefore, the Commonwealth of Massachusetts had full jurisdiction over the regulation of intrastate telephone rates after and notwithstanding action by the President under the Joint Resolution of July 16, 1918.

III. In view of the provisions of the Joint Resolution of Congress, neither the United States nor the President nor the Postmaster-General was a necessary

party to a suit to enforce an order of the Public Service Commission, directed to the respondent, relating to such rates. Such a suit was not, in substance or effect, one against the United States. It was within the jurisdiction of the state court to restrain the respondent from exceeding the authority granted to it by that Resolution.

IV. The question whether the Public Service Act of Massachusetts is to be interpreted as applying to the respondent, when acting as an instrumentality of the Federal government, is one primarily for the determination of the state court when its jurisdiction has been established. If this court can, and is willing, to deal with it at this stage of these proceedings, it is submitted that it must construe this statute as applicable to the respondent under existing conditions.

ARGUMENT.

I.

The Respondent through its Officers and Employees is now operating the Telephone System owned by it as an Instrumentality of the Federal Government.

Prior to midnight July 31, 1918, the respondent was admittedly engaged in operating its telephone system as a public service corporation for the financial benefit of its stockholders. At that time, by virtue of a proclamation dated July 22, 1918, possession and control of all its properties was assumed by the President. It does not appear that any act with reference to these properties, other than the issuing of this proclamation, was performed by or in behalf of the President.

By the proclamation he directed "that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General." (Record, p. 21.) He also authorized him to perform the duties imposed upon him "through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems." He directed that, until the Postmaster-General shall order otherwise, "the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be." (Record, p. 21.)

On August first, the Postmaster-General, in announcing that he had taken possession and control of these systems, issued a general order in which he declared that "until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. . . . All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment." (Record, p. 23.)

So far as the public was concerned, there was no break or change in the operation and apparent control of the system of the respondent. Its business has been continued in precisely the same general manner as before, in the name of the respondent and through

the acts of its officers and employees. In fact, there appears at no time to have been any actual change in the physical possession of its properties. That has always remained in the corporation. There was nothing which amounted to a seizure by any representative of the United States. All that occurred was that the President formally assumed control of the property and the business of the respondent and entrusted that control to the Postmaster-General. The latter in turn directed that "the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels."

In other words, what was done, both in Massachusetts and throughout the country, was merely to assume control of the companies and through them of the properties, business and employees. The companies were required thereafter to operate in the interest of the Federal government and subject to the orders of the Postmaster-General. In fact, the government took possession of these systems merely by making the corporations owning and operating them its agents. Their possession continued as before, but, on and after August first, that possession was in behalf of the government as its agents.

This is expressly conceded by Mr. Lamar, Solicitor of the Post Office Department, and one of the committee appointed by the Postmaster-General for the Government operation of the telephone systems. In a letter dated January 15, 1919, addressed to one of the petitioners, (See Bill of Complaint, Exhibit B, Appendix C (Record, p. 11,)), he uses this expression, "the New England Company, which, as you are aware, is now and ever since August 1, 1918, *has been operating its*

properties for the account of the Government and not for the benefit of its stockholders." This statement of the legal advisor of the Postmaster-General is utterly inconsistent with any theory that the respondent corporate entity is not still actually operating its system through its officers and employees.

It is obvious that there were no other practical means by which the problem could be handled without serious interruption in the business of these companies. Vast bodies of officers and employees could not be transferred from the service of these companies to the direct service of the United States without their consent. They must continue to be officers and employees of these corporations as before and subject to the direction of their superiors in the service of the corporations. Only in this way could these huge systems be taken over as complete going concerns. The directors, officers and employees of each of these companies stood in no relation whatever to each other except through their mutual relationships to the corporation. To destroy those relationships and to attempt to force upon these employees a direct relationship to the Federal government would have meant a complete disruption of these systems.

Thus the only thing that happened on August first was that the telephone companies ceased to be independent corporations, conducting their own systems for their own financial benefit, and thereafter, though still having the legal title to and the actual possession of their properties, became instrumentalities of the Federal government, exercising their corporate functions, holding and operating their properties and controlling their officers and employees solely as such instrumentalities.

They now are subject to the direction of the President and the Postmaster-General and conduct their systems for the financial benefit of the government. They are paid by the government for the use of their properties and for their services in operating them for the government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the Joint Resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed. It is the respondent, through its corporate machinery, that has established and is charging in Massachusetts these new rates. To be sure, it is doing so at the order of the Postmaster-General and not in the exercise of any independent judgment on the part of its officers, but it is doing so by the exercise of its corporate powers and through its control over its employees. It would not be possible for the Public Service Commission to choose any officer or employee of the respondent against whom it might direct its order with any assurance that it was within his power to cause it to be obeyed. Any injunction against the respondent, however, binds all its officers and employees and requires them to exercise the powers of the corporation to bring about obedience to it.

Doubtless, the respondent may find itself in a position where it will be required to choose between obeying a decree of this court and carrying out an illegal order of the Postmaster-General. An alternative of that character, however, is always possible when a superior officer, public or otherwise, seeks to require a subordinate to perform an illegal act. In the case at

bar, it cannot be assumed that, when that illegality has been demonstrated, the Postmaster-General will continue to insist upon his order. Even if that should occur, it would not in any way excuse this respondent from the consequences of its illegal act.

II.

Jurisdiction of Massachusetts over the Regulation of Intrastate Telephone Rates, after Action by the President under Joint Resolution of July 16, 1918, reserved to it by that Resolution.

There can be no question as to the power of the Commonwealth to regulate, within constitutional limitations, the rates to be charged by telephone companies for service rendered by them within the State. Such companies are conducting a business charged with a public interest which is as much subject to such regulation as is the business of a railroad.

> Western Union Telegraph Co. *v.* Foster, 224 Mass. 365, 372.
> Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14.

Resolution within War Powers.

Admittedly, the Joint Resolution of Congress under which the President took control of these systems and properties was passed under the war powers of Congress. Unquestionably those powers must be given the widest scope required by the emergency which called them into action. We raise no question but that Congress had the power to authorize, or even to

require, the taking over of the telegraph and telephone systems of the country by the Federal government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of Federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers.

Possible Limitations.

Obviously, Congress could not authorize the taking of these systems by the Federal government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a state as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *à fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the

admitted purpose of the establishment of the rates in question. (Record, p. 11.) Such action seems to go beyond the scope even of the far-reaching war powers.

Limitations recognized.

However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the states should be interfered with as little as possible. The resolution as originally drafted, and finally enacted, contained this express reservation to the states: —

> "*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

This is an express enactment that action by the President under the resolution shall not "amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States," except to the extent that such regulations may affect the transmission of government messages or the issue of stocks and bonds by the companies whose properties have been taken.

Question One only of Construction.

The question now before the court turns entirely upon the interpretation to be given this proviso. Did Congress intend by it to reserve to the states the right to enforce existing statutory regulations for the de-

termination of telegraph and telephone rates? If so, the only question that remains concerns the manner in which this reserved power shall be exercised.

"Lawful police regulations" can only mean regulations established in the lawful exercise of the police power. **"Police Regulations" defined.**

Chicago, Burlington & Quincy R.R. *v.* Illinois, 200 U. S. 56.

Railroad Co. *v.* Fuller, 84 U. S. 560, 568.

That power is not restricted as to the regulation of matters connected with the public health, safety or morals, but extends to everything which concerns the public convenience and the general welfare.

Sligh *v.* Kirkwood, 237 U. S. 52, 59.

German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.

Eubank *v.* Richmond, 226 U. S. 137, 142.

The Constitution of Massachusetts (Pt. II., c. I., Art. IV.) grants to the General Court full power and authority "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." The power thus granted and defined has long been recognized as the police power.

Commonwealth *v.* Alger, 7 Cush. 53, 85.

Commonwealth *v.* Danziger, 176 Mass. 290, 291.

In Commonwealth *v.* Alger, Shaw, C.J., said:—

"We think it is a settled principle, growing out of the nature of well ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

In that case the defendant was the owner in fee to low water mark of certain lands bordering upon Boston harbor, subject, however, to the public rights of navigation and fishing. The establishment of a harbor line

by the Commonwealth, by which the defendant was forbidden to build a wharf beyond that line and to the full extent of his ownership, was sustained solely under the police power. This general principle was laid down as governing the application of that power: —

> "Whenever there is a general right on the part of the public, and a general duty on the part of a land owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." (Page 95.)

This principle extends to all cases where property is charged with a public interest. The police power is the power which is employed to define with precision the extent of that interest and to regulate the conflicting rights and duties of the individual and the public.

Rate Regulation an Exercise of Police Power.

It is precisely this principle that is applied in the regulation of the rates to be established by persons engaged in a business which is held to be charged with a public interest. Upon such persons the duty is imposed of conducting their business and the property devoted to it so as not to impose upon the public which they serve an unreasonable burden for their service. This common-law duty to make only reasonable charges being established, resort must be had to the police power whenever it is desired more clearly to define what charge is reasonable or to establish a method for readily determining that question.

Thus when, in Munn *v.* Illinois, 94 U. S. 113, this court had before it the question of the validity of a state statute fixing maximum charges for the storage of grain, that court at once recognized that it was

dealing with the limits of the police power of the states. It approached the question precisely as did Chief Justice Shaw in Commonwealth *v.* Alger, referring even to the same passages from Lord Hale. In general definition of the power, the court said: —

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and w

think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." (Page 124.)

It was pointed out that the police power may be thus exercised to regulate rates and charges only in the case of a business or calling which is charged with a public interest. Thus it was recognized to be applicable to the regulation of the rates of common carriers and was held to apply to the similar regulation of public warehousemen.

Since this case and the companion cases in the same volume relating to the regulation of railroad rates, it has never been doubted that it was within the power of the States to fix reasonable rates to be charged by common carriers for purely intrastate service. It has seldom since been necessary to state the precise source of that power. The court has been rather concerned with the manner of its exercise. It has, however, in no way modified the fundamental reasoning of Munn *v.* Illinois, and has frequently recognized that, in cases of this character, it was merely dealing with the limits of the police powers of the states.

Budd *v.* New York, 143 U. S. 517.
Minnesota Rate Cases, 230 U. S. 352.
German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.
Atchison, Topeka & Santa Fé Ry. Co. *v.* Vosberg, 238 U. S. 56, 59.
Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574, 578, 579.
Union Dry Goods Co. *v.* Georgia Public Service Corp., 248 U. S. 372, 375.

anguage
Proviso
iscussed.

The language of the proviso of the Joint Resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the states show the breadth of that reservation. Neither "the transmission of Government communications" nor the "issue of stocks and bonds" is a matter that would be ordinarily affected by regulation in the interest of the public health, safety or morals. In fact, the chief if not the only ground for the regulation of the issue of stocks and bonds by carriers or other public service corporations is the close connection between such issues and the rates to be charged by these corporations for their service to the public. Such rates may in general be charged as will give a fair return on invested capital. States attempt to control the issue of stocks and bonds largely to make sure that those issues fairly represent property actually and properly invested in the business, in order to protect the public from paying rates based upon improper investments or an inflated capital.

Thus, the control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless. Its inclusion in the resolution plainly shows that these words were intentionally used in their broad sense and included the regulation of telegraph and telephone rates to the extent that the states already possessed such power.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear

that, to the extent that the public is to be permitted to use them as before, the regulative powers of the states should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government messages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

History of Language of Proviso.

The history of the Joint Resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion. The resolution appears to have been introduced in Congress in precisely the same form in which it was enacted. Various attempts were made to amend it in the Senate, but they were unsuccessful. It is the previous history of the language of the proviso that is important. This language was taken, with only one change made necessary by the different subject matter of the resolution, from the statute approved March 21, 1918, for the operation of the railroad systems under Federal control. (U. S. Stats., Second Session, 65th Congress, Part I., c. 25.) Section 15 of that act is as follows: —

Taken from Railroad Control Act.

"That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

As the Joint Resolution and this statute are dealing with problems of precisely the same character, namely, the manner of operation under Federal control of great systems of communication, previously subject

in part to state regulation, it is obvious that the language of the proviso and of this section must be regarded as having been used with precisely the same meaning. The history of section 15 of the Railroad Control Act is in fact the history of the proviso of the Joint Resolution.

History of that Act.

No portion of section 15 was contained in the bill as originally drafted. Subsequently in the House, the following clause was inserted: "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws of the States in relation to taxation." The same words were inserted in the Senate bill on February 21, 1918, by amendment. (56 Cong. Rec., p. 2445.)

On February 28, 1918, the following amendment, inserted at the end of the clause just quoted, was accepted by the committee and agreed to by the House: —

> "or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds." (56 Cong. Rec., p. 2820.)

It was later authoritatively stated on the floor of the House by Chairman Sims, of the committee having the bill in charge, that these words "have reference to the police powers of the states." (56 Cong. Rec., p. 3498.)

It is plain that if that section had been finally adopted in this form no claim could be made that the powers of the states to regulate railroad rates had been

reserved to them. It would be clear from the language of the exception that any police regulations affecting the control of rates would have been excepted from the reservation.

The insertion of this exception relating to the regulation of rates clearly establishes that the broad term "the lawful police regulations of the several states", as used in this clause, was regarded as including all matters of rate regulation within the power of the states. The insertion of the exception is conclusive upon this point.

It is obvious, however, that if the bill had been left in this form, the reservation to the states of the power to enforce police regulations would have been a mere shadow, for the subjects excepted embrace the most important of the powers exercised over railroads by the states under their police powers. Recognizing this and with the obvious intention of permitting far less interference with the rights of the states, the words "the regulation of rates, the expenditures of revenues, the addition to or improvement of properties" were struck out as a result of a conference between committees of the Senate and of the House in the final stages of the bill. (56 Cong. Rec., pp. 3241, 3420, 3435, 3443, 3500.) The only conclusion which can be drawn from this action is that the extent of the reservation of powers to the states was carefully considered at the final stages of this bill and that, by this amendment, a clear intention was expressed to reserve to the states, to some extent at least, their powers of rate regulation.

Conclusion from History.

When there came before Congress the matter of providing for the extension of Federal control from the railroads to the telegraph and telephone systems, it

was but natural that the same general policy with relation to the preservation of the powers of the states should be adopted. Thus Congress turned to the provision which it had carefully worked out but four months before with reference to the railroads. It adopted that provision without change and it must be said to have adopted it with a full appreciation of the meaning so plainly given to it by its history.

Of course, the railroad control act contained more detailed machinery than the Joint Resolution for dealing with the matter of rates, but it contained no provision in any wise inconsistent with section 15 as above interpreted. Even though some of the provisions of that act might be thought somewhat to modify section 15, no such modification can be found in the Joint Resolution under consideration. In that resolution there is no provision whatever, other than that under consideration, having the remotest bearing upon the matter of rate regulation. The proviso must therefore be given its full meaning as disclosed by its plain language read in the light of the history of that language.

Conclusion. Accordingly, the Public Service Commission of Massachusetts submits that the Joint Resolution of Congress, under which the telephone system of the respondent was taken over by the Federal Government and under which it is now being operated, must be interpreted as expressly reserving to that state the same powers with reference to the regulation of the rates to be charged for communication between points within it upon the system of the respondent that it had before the period of Federal control.

III.

This Suit is not beyond the Jurisdiction of the Massachusetts Court on the Ground that the United States is a Necessary Party or that the Suit is in Effect against the United States.

This proceeding is not a suit against the President or against the Postmaster-General. No process or injunction is sought against either. There is no occasion to determine whether it would be within the power of the court to enjoin the Postmaster-General, if he were found within the State, from disobeying the order of the Public Service Commission in violation of the limitations on his authority imposed by the Joint Resolution.

Here the suit is directed, and an injunction is sought, merely against a corporation which, until July 31, 1918, was admittedly subject to all the processes of the state court, but which is now acting as an instrumentality of the Federal Government. Doubtless, to the extent that it is acting in accordance with valid Federal authority, and to the extent that it is obeying the valid orders of the Postmaster-General, it cannot be restrained by any court. But it can derive no protection from an order, either of the President or the Postmaster-General, which is in violation of their authority under the Joint Resolution. The respondent is bound by no duty to disobey the Act of Congress merely because the Postmaster-General so directs.

The question of the extent of the exemption of

Federal agencies from state interference has been frequently considered by this court.

State Power over Federal Agencies.

In National Bank *v.* Commonwealth, 9 Wall. 353, in sustaining the right of a State to require a national bank to pay, in the first instance and on account of its shareholders, a tax assessed upon its shares (*Cf.* St. 1909, c. 490, pt. III., §§ 11–13) the court, at pages 361, 362, said: —

> "The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency, in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

Similar questions have arisen with reference to the jurisdiction of states over railroads incorporated by Act of Congress, especially in the case of the Union Pacific Railroad, which was, by an act approved July 1, 1862, in the midst of the Civil War, created for the purpose, frequently reiterated in that act, "of aiding in the construction of said railroad and telegraph line, and to secure a safe and speedy transportation of the mails, troops, munitions of war and the public stores thereon."

In Railroad Company *v.* Peniston, 18 Wall. 5, it was recognized that the Union Pacific Railroad was an agent of the Federal government and that Congress might interpose to protect it from state taxation. In the absence of such action it was held that a tax upon its property was valid.

In Union Pacific Railway Company *v.* Burlington & Missouri River Railroad Company, 3 Fed. 106, the power of the states to regulate the crossing and connection of railroads, and in Union Pacific Railway Company *v.* Leavenworth N. & S. R. Co., 29 Fed. 728, the power of eminent domain of the states, were held applicable to this Federal corporate agency.

In Smyth *v.* Ames, 169 U. S. 466, it was contended that the Union Pacific Railroad was not within the reach of the rate regulating power of any state by reason of the provisions of the Act of Congress of July 1, 1862, creating it. The court made the following answer to this contention (p. 521): —

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to

Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

A similar result had previously been reached as to another railroad of Federal incorporation in Reagan *v.* Mercantile Trust Co., 154 U. S. 413.

In none of these cases is there the least suggestion, even from the parties seeking to impeach the rights of the states to tax or to regulate, that those powers when once conceded to the states by Congress could not be enforced by all valid legal processes against these corporate governmental agencies.

Jurisdiction over Officers acting illegally.

An officer of an agent of the United States is not protected from the legal consequences of his acts or from judicial processes establishing those consequences, even by the fact that he is acting under the color of an express order of the President. If that order for any reason is invalid, the officer may be held liable to pay the damages caused by his act.

Little *v.* Barreme, 2 Cranch, 170.
Belknap *v.* Schild, 161 U. S. 18.

Possession of real property held by him in behalf of the United States and in assertion of its authority may be taken from him by ejectment proceedings.

United States *v.* Lee, 106 U. S. 196.
Tindal *v.* Wesley, 167 U. S. 204.

And the injunctive processes of a court of equity may be employed to restrain him from acting in violation or excess of his authority.

Philadelphia Co. *v.* Stimson, 223 U. S. 605, 620.
School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94.
Noble *v.* Union River Logging Railroad Co., 147 U. S. 164.

In Philadelphia Co. *v.* Stimson, although an injunction was sought against the respondent as Secretary of War, the court thus put one side the question of its jurisdiction over him: —

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. Little *v.* Barreme, 2 Cranch, 170; United States *v.* Lee, 106 U. S. 196, 220, 221; Belknap *v.* Schild, 161 U. S. 10, 18; Tindal *v.* Wesley, 167 U. S. 204; Scranton *v.* Wheeler, 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. Osborn *v.* Bank of United States, 9 Wheat. 738, 843, 868; Davis *v.* Gray, 16 Wall. 203; Pennoyer *v.* McConnaughy, 140

U. S. 1, 10; Scott *v.* Donald, 165 U. S. 107, 112; Smyth *v.* Ames, 169 U. S. 466; *Ex parte* Young, 209 U. S. 123, 159, 160; Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146; Herndon *v.* C., R. I. & P. Ry. Co., 218 U. S. 135, 155; Hopkins *v.* Clemson College, 221 U. S. 636, 643–645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. Noble *v.* Union River Logging R.R. Co., 147 U. S. 165, 171, 172; School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94."

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In this case the court made plain that this principle is not restricted to cases where the officer is acting under an invalid statute, but held that it applies in all cases where he is assuming to exercise a power which is in excess of the authority granted to him. At page 621 the court said:

"Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte* Young, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

As against state officers, the principle under discussion has been frequently recognized by this court in sustaining the jurisdiction of the Federal courts to enjoin such officers from acting under the authority of unconstitutional state statutes.

Smyth *v.* Ames, 169 U. S. 466.
Ex parte Young, 209 U. S. 123.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499, 506.
Cavanaugh *v.* Looney, 248 U. S. 453, 456.

Similarly, those courts will enjoin acts in violation of the Federal Constitution done by state officers in ostensible enforcement of valid state statutes, on the ground that such acts are in excess of the officers' authority and thus not the acts of the state; that is, they will enjoin the unconstitutional administration by state officials of valid state statutes.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362.
Raymond *v.* Chicago Traction Co., 207 U. S. 20.
Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499.

Analogy to Illegal Tax Cases.

The case at bar is closely analogous to these two groups of cases. In those cases, though no suit could be brought against the state, jurisdiction is assumed to restrain a public officer from collecting taxes for the

benefit of the state, when the authority under which he is purporting to act is either invalid or does not warrant his attempted action. In the case at bar the claim is that an instrumentality of the United States is attempting to collect telephone rates from citizens of Massachusetts in violation of the express terms of its authority to act for the United States. In both classes of cases the officer or governmental instrumentality is purporting to act solely for the benefit of the government which he represents. An injunction has the effect of depriving that government of money which it would otherwise receive. After it has actually received it, there is obviously no remedy in the absence of its consent to be sued. But the cases relied upon plainly recognize jurisdiction to prevent public officers or instrumentalities from exacting from the public illegal payments, even though all sums collected are to go into the public treasury.

Cases relied upon by State Court distinguished.

The cases relied upon by the court below come within an entirely different class. Most of them, including the various cases against the Secretary of the Interior, involve the title to land whose ownership is claimed by the United States. Others, like Belknap *v.* Schild, 161 U. S. 10, and International Postal Supply Co. *v.* Bruce, 194 U. S. 601, involve the right to use property owned by the United States. In such cases, to issue an injunction restraining use of the property by a public officer would be in effect to enjoin the United States from using its own property. Wells *v.* Roper, 246 U. S. 335, was an attempt to enforce specific performance of a contract of the United States by a bill to restrain a public officer from cancelling it. To grant this relief would have been in effect to require

the United States to perform its contract. The case of Louisiana *v.* McAdoo, 234 U. S. 627, was an attempt to review the official acts of the Secretary of the Treasury in the enforcement of the customs laws. No one of these cases is in any way comparable to the tax cases above referred to or to the case at bar. In no one of them was there any claim that a public officer was threatening to require the complainant to make payments into the public treasury which were in violation of law.

Conclusion.

The Joint Resolution, interpreted as reserving to the states the power to regulate rates, is in effect a direction by Congress to every Federal officer connected with the operation of the telephone systems and to every instrumentality, corporate or otherwise, employed in that operation, to obey all valid assertions of that power by state authorities. The failure of the respondent as a Federal agency to conform to that direction of Congress is plainly an act in excess of the authority granted it by the Federal government. It is not protected by its abuse of power even by the orders of the Postmaster-General. He, too, would be equally within the reach of the injunction of the state court, if he was personally within its territorial jurisdiction.

If the Joint Resolution or the action of the President under it were unconstitutional, it would plainly follow that the present proceeding would not be a suit against the United States. In that event it would unquestionably be within the jurisdiction of the state court to restrain the respondent from the commission of an illegal act. It can be none the less so, when the ground of the suit is not that Congress has attempted and

failed to grant the authority relied upon, but that it has expressly withheld it.

Accordingly, it is submitted that it was within the power of Massachusetts court by proper decree and process to require the respondent, even as a Federal instrumentality to obey all valid orders of the Public Service Commission directed against it.

IV.

The Public Service Commission is authorized by Existing Statutes of the Commonwealth to enforce the Power reserved to the States by the Joint Resolution.

If the three foregoing propositions are decided by this court in favor of the petitioners, the jurisdiction of the court below to determine this case is established so far as any Federal question is concerned. The decree of dismissal must be reversed.

One further question must be determined before a decree requiring the respondent to obey the order of the Public Service Commission can be entered, namely, whether the existing statutes of Massachusetts with reference to the regulation of telephone rates apply to a corporation in the situation in which this respondent now finds itself. Upon this point the court below has expressed no opinion, since it dismissed the suit for want of jurisdiction before reaching that question. It would seem that this was purely a local matter to be determined by the Massachusetts court after its jurisdiction has been established by a decision by this court of the Federal questions involved. There would seem

to be no question, however, but that these statutes will be held applicable to the respondent under existing conditions.

The Public Service Act (St. 1913, c. 784, § 2) establishes the authority of the Commission in part as follows: —

"SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto."

Sections 20, 21 and 22 (see Appendix, pp. 39–42), dealing with the regulation of rates for service, apply to "every common carrier" (§ 20) as defined in section 2.

Plainly, the respondent is furnishing and rendering "for public use within the commonwealth" the service described in section 2 (*c*). It is, therefore, a common carrier as defined in section 2, and thus brought within the jurisdiction of the Commission.

To be sure, it is now rendering that service solely

as an instrumentality of the Federal Government, but it is still a corporation within the jurisdiction of the Commonwealth. It is still within the power of the Commonwealth, by the express terms of the Joint Resolution, to tax the respondent under Mass. St. 1909, c. 490, pt. III., §§ 40–43. Without permission of the Federal Government, doubtless this could not be done. But there is no question but that taxes may be imposed upon such corporate instrumentalities by the states when Congress so authorizes. Such an authority of limited scope has long been in existence as to national banks.

U. S. Rev. Stat., § 5219.
Van Allen *v.* Assessors, 3 Wall. 573.
Mercantile Bank *v.* New York, 121 U. S. 138.
Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 667.
Bank of California *v.* Richardson, 248 U. S. 476, 483.

Therefore, construing the Joint Resolution as reserving to the States the power to regulate intrastate rates, and as the provisions of the Public Service Act are plainly applicable to every corporation furnishing telephone service for the public within the Commonwealth under any circumstance, those provisions must be held applicable to the respondent, even though it is a government instrumentality. This statute would still in terms apply to the respondent without the reservation in the Joint Resolution, but doubtless in that case it could not be enforced against it while such an instrumentality. If Congress has consented that there

shall be no immunity from state regulation on this ground, the plain terms of the statute necessarily apply.

Then the reservation in the resolution is not merely of the police *powers* of the states. In such a form it might be argued that it called for definite exercise of those powers directly against this government instrumentality. The resolution provided "that nothing in this Act shall be construed to amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States." This is a definite declaration that all lawful police regulations then in force or thereafter to be enacted shall not be affected by the action of the President under the authority given him by the resolution. It plainly indicates an intention both to leave in full force *existing police regulations* and also to subject these systems in the Federal control to any future regulation that may be validly enacted.

It is submitted that it cannot be successfully contended that the respondent in its present status does not come within the reach of the powers granted to the Public Service Commission by the Public Service Act.

V.

Conclusion.

Accordingly, the Public Service Commission of Massachusetts contends that the decree of the Supreme Judicial Court, dismissing the petition for want of jurisdiction, should be reversed and that that court should be directed to proceed to the enforcement of the order of the Public Service Commission in question in the same manner and to the same extent as it is authorized

to enforce such an order directed to a telephone company not subject to Federal control or not acting as a Federal instrumentality.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General for the Commonwealth of Massachusetts.

WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

APPENDIX.

Mass. St. 1913, c. 784 (The Public Service Act), provides: —

SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto.

. . . . . .

SECTION 20. Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the

commission may order. In the case of common carriers the forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the interstate commerce commission. No common carrier shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the commission shall order, to be given prior to the time fixed in such notice to the commission, for the changes to take effect. The commission for good cause shown may allow changes without requiring the thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and

filed, as the commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: *provided, however*, that when any such contract or contracts are or become terminable by notice, the commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph or telephone corporation as and when directed by such order.

SECTION 21. Whenever the commission receives notice of any change or changes proposed to be made in any schedule filed under the provisions of this act, it shall have power, either upon complaint or upon its own motion, and after notice, to hold a public hearing and make investigation as to the propriety of such proposed change or changes. Pending any such investigation and the decision thereon, the commission shall have power, by any order served upon the common carrier affected, to suspend the taking effect of such change or changes, but not for a longer period than six months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation, the commission may make such order in reference to any new rate, joint rate, fare, telephone rental, toll, classification, charge, rule, regulation or form of contract or agreement proposed, as would be proper in a proceeding initiated after the same has taken effect. At any such hearing involving any proposed increase in any rate, joint rate, fare, telephone rental, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the

common carrier. If at a hearing involving any proposed decrease in any rate, joint rate, fare, telephone rental, toll or charge demanded by any common carrier, it shall appear to the commission that the said rate, joint rate, fare, telephone rental, toll or charge is insufficient to yield reasonable compensation for the service rendered, the commission shall have power to determine what will be the just and reasonable rate or rates, fare or fares, telephone rental or rentals, toll or tolls, charge or charges, to be thereafter observed in such case as the minimum to be charged, and to make an order that the common carrier complained of shall not thereafter demand, charge or collect any rate, fare, telephone rental, toll, or charge lower than the minimum so prescribed without first obtaining the consent of the commission, not to be given without a public hearing.

SECTION 22. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges or any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers,

agents and employees. The commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the commission such authorization is consistent with the public interests, and the commission may from time to time modify or revoke such authorization.

. . . . . .

SECTION 27. The supreme judicial court shall have jurisdiction in equity to review, annul, modify or amend any rulings or orders of the commission which are unlawful to the extent only of such unlawfulness. The procedure before the said court shall be that prescribed by its rules, which shall state upon what terms the enforcement of the order shall be stayed. The attorney for any party petitioning the supreme judicial court hereunder shall file with the clerk of the court a certificate that he is of opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. The burden of proof shall be upon the party adverse to the commission to show that its order is invalid. Any proceeding in any court of this commonwealth directly affecting an order of the commission or to which the commission is a party shall have preference over all other civil proceedings pending in such court, except election cases.

SECTION 28. The supreme judicial court shall have jurisdiction upon the application of the commission to enforce all valid orders of the commission and all the provisions of this act. Whenever the commission shall be of opinion that a common carrier subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law

or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of the law or of any order of the commission, it shall direct counsel to the commission to begin, subject to the supervision of the attorney-general, an action or proceeding in the supreme judicial court in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

Joint Resolution of Congress of July 16, 1918.

To authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *provided,* That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-

five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: *provided, further,* That *nothing in this Act shall be construed to amend, repeal, impair, or affect* existing laws or powers of the States in relation to taxation or *the lawful police regulations of the several States,* except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

FREDERICK J. McLEOD AND EVERETT E. Stone, constituting the Public Service Commission of Massachusetts, Petitioners,
v.
NEW ENGLAND TELEPHONE & TELEgraph Company.
} No. 957.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

DAKOTA CENTRAL TELEPHONE COMPANY et al., Plaintiffs in Error,
v.
THE STATE OF SOUTH DAKOTA, EX REL. et al.
} No. 967.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR THE RESPONDENT IN NO. 957 AND THE PLAINTIFFS IN ERROR IN NO. 967.

STATEMENT OF THE CASE.

INTRODUCTION.

These are suits brought, in the one instance by the Public Service Commission of Massachusetts, and in the other by the State of South Dakota on the

relation of its Attorney General and Board of Railroad Commissioners (hereafter collectively referred to as plaintiffs), against certain telephone companies (hereafter called defendants) seeking an injunction to enjoin said defendants from putting into effect an order (No. 2495) of the Postmaster General, Albert S. Burleson, effective January 21, 1919, establishing a classification of service and schedule of charges for toll and long-distance telephone service furnished by telephone systems operated by the Postmaster General in pursuance of a Joint Resolution of Congress and a Proclamation of the President, in so far as said order relates to or affects telephone messages between points wholly within said States, respectively. (R. No. 957, 1–12; No. 967, 3–13.)

THE MASSACHUSETTS CASE.

In No. 957 the Public Service Commission of the Commonwealth of Massachusetts on February 1, 1919, filed in the Supreme Judicial Court of that Commonwealth, in Suffolk County, a bill of complaint against the New England Telephone & Telegraph Company, alleging that said company is a public service corporation engaged in said Commonwealth in the business of transmitting intelligence by means of telephone lines (R. 1).

The bill alleged that on or about July 31, 1918, the President of the United States, acting under a Joint Resolution of Congress approved July 16, 1918, took possession and assumed control of all telephone systems and properties in the United States, includ-

ing those of defendant telephone company, and placed such properties in the general charge of the Postmaster General of the United States, who in turn entrusted to defendant telephone company the direction and operation of its properties (R. 1).

The bill further alleged that on December 21, 1918, defendant company by direction of the Postmaster General transmitted to the Secretary of said Public Service Commission "basic toll rate schedule No. 1 cancelling and superseding the basic toll rate schedules filed with [said] Commission on October 18, 1916, this basic schedule [being] in accordance with Telephone & Telegraph Bulletin No. 22, Order No. 2495, of the Postmaster General * * * effective January 21, 1919" (R. 1–2, 23).

Further, that plaintiffs on January 9, 1919, pursuant to section 21 of chapter 784 of the Laws of 1913 (Mass.), gave notice of a public hearing on said proposed schedule to be held on January 17; that hearings were held on said date and on January 30 at which a representative of defendant was heard; that on January 20, 1917, plaintiffs issued an order pursuant to said act suspending said proposed schedule of rates until February 20, 1919; and that on January 31, 1919, plaintiffs made a report on said schedule and entered an order requiring defendant to cancel the same and to put into effect said former rates (R. 2).

That notwithstanding plaintiffs' order of January 20, 1919, defendant company, on January 21, 1919, put into effect said new schedule and is now charging

the rates prescribed therein; that said defendant denies plaintiffs' jurisdiction to enter said orders or to fix or determine intrastate rates; and that by said chapter 784 of the Laws of 1913 of said Commonwealth, and said Joint Resolution of Congress, it is defendant's duty to obey plaintiffs' orders. Injunction temporary and permanent accordingly is prayed (R. 2–3).

The Massachusetts statute under which the Public Service Commission claims authority prescribes that said commission shall, so far as necessary to carry out the provisions of said act or any other act, have general supervision and regulation of, and jurisdiction and control over, all persons, firms, corporations, associations, and joint-stock associations or companies rendering or furnishing in said Commonwealth certain classes of service, including telephone service. Such companies, therein called common carriers, are required to file all rates and charges with the Commission, and changes in rates can only be made after hearing before the Commission, which can refuse to allow a change, or itself fix a reasonable rate or charge. (Laws and Resolves of Massachusetts, 1913, ch. 784.)

THE SOUTH DAKOTA CASE.

In No. 967 the State of South Dakota, on the relation of its Attorney General and Board of Railroad Commissioners, on January 20, 1919, filed a complaint in equity in the Supreme Court of that State, exercising original jurisdiction, against the Dakota

Central Telephone Company and three other telephone companies owning lines and plants in said State and alleged to be doing business therein, alleging in substance as follows:

That under the statutes of said State (Sess. Laws 1909, c. 289, sec. 2, as amended by Sess. Laws 1911, c. 218) said Board has general supervision and control over all telephone lines and exchanges in said State, with power to inquire into unjust discriminations and violations of law, and with power to fix individual rates and make schedules of maximum rates to be charged by telephone companies; that by the provisions of said laws telephone companies before commencing to charge any rate must file a full and correct tariff thereof with said Board; that certain notices must be given and hearing had and the assent of said Board obtained before any increase is made in any such rate; and that it is unlawful for any such company to charge, demand, collect or receive any higher rates for intrastate service than those established with the approval of said Board (R. 4–6).

That said Board is now engaged in and has not completed a state-wide investigation as to the reasonableness, justness, and propriety of existing rates for telephone service in said State and as to rules, regulations and classifications relating to such service, and will, when it has concluded same, fix and establish reasonable rates, etc., for all service between points in said State (R. 6).

That notwithstanding the foregoing provisions of law and in disregard of the authority of said Board, defendant telephone companies propose to, and unless restrained will, put into effect new schedules of rates, charges, and classifications for intrastate service on January 21, 1919, without having procured the approval thereof by said Board (R. 6–7).

That this will be done because, on July 23, 1918, the President, in compliance with a Joint Resolution of Congress, approved July 16, 1918, authorizing him so to do, took possession of all telegraph and telephone lines, including those of defendant companies, and placed them in charge of the Postmaster General; that said Postmaster General by his order No. 2495 established said schedule of rates effective January 21, 1919, for service within the State of South Dakota; and that defendant companies contend that they are required and compelled to establish and make effective such rates (R. 7–9).

That the Postmaster General has no power or authority under the Resolution of Congress or the Proclamation of the President to initiate intrastate telephone rates; that said Resolution provides that nothing therein contained shall be construed to amend, repeal, impair, or affect existing laws or powers of taxation, or, "the lawful police regulations of the several States;" and that thereby the power was reserved to the State of South Dakota to regulate intrastate rates for telephone service of all classes and to prevent their change except after submission

to and approval by said Board of Railroad Commissioners, as provided by the laws of said State (R. 8–9).

That the State through its departments of government is a heavy user of intrastate long distance telephone service, and the putting into effect of the new schedule of rates, etc., will greatly increase the charges therefor to the State and the public (R. 9).

SUBSTANCE OF THE ANSWERS.

The defendant telephone companies in each of said cases filed substantially the same answer:

The answers severally allege the passage by Congress of the Joint Resolution approved July 16, 1918, 40 Stat. 904, authorizing the President "to supervise or take possession and assume control of any telegraph or telephone * * * system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision [etc.] shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace" (R. 957, 13–14; R. 967, 18–19).

Said answers further allege the Proclamation of the President dated July 22, 1918, taking possession and assuming control of the telephone and telegraph systems. Said proclamation provided that the operation and control of such systems should be exercised by and through the Postmaster General; that the latter should perform the duties thereby imposed on him, so long and to such extent as he might determine, through the owners, officers, and employees of such

systems; that the Postmaster General may by subsequent order release the control and operation, in whole or in part, of any system "hereby assumed"; and that from and after midnight of July 31, 1918, all such systems "shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice" (R. 957, 13–14, 20–21; R. 967, 19–20).

Said answers further allege that such possession and control and operation was assumed from midnight of July 31, 1918, and still continues; that defendant companies have been divested of their systems (except the title thereto) and of full power, management, and control thereof; that said defendants and their officers and employees since said date have not been in possession of said systems except as agents, representatives, or instrumentalities of the United States, acting under the direction and control of the President and the Postmaster General; that the compensation to be paid by the United States to all defendants save one has been fixed and agreed on, as authorized by said Joint Resolution of Congress; and that the rates, tolls, and earnings of said systems belong to the United States and not to said defendant companies, who have no pecuniary interest therein under the arrangement and contract for compensation made, and will have none until the possession of the United States under said Joint Resolution is terminated (R. 957, 15–16; R. 967, 21–22).

The right of the public service commissions to interfere with the rates prescribed by the Postmaster

General, or that such rates need their approval before they are lawfully effective, or that the proviso of said Joint Resolution, preserving in effect the lawful police regulations of the States, relates to or confers any such right as is claimed by said commissions, is denied (R. 957, 17–18; R. 967, 24–25).

The answers also set up that to these suits the President and the Postmaster General are indispensable parties and can not lawfully be made such; that the suits are in effect suits against the United States and directly affect it and its interests, and that they can not be maintained because the United States has not consented to be sued (R. 957, 19–20; R. 967, 24–25).

DECISIONS OF THE COURTS BELOW.

No. 957—the Massachusetts Case—This case was reserved by the Justice to whom the application for injunction was made for the determination of the full court upon bill and answer. The Supreme Judicial Court, in an unanimous opinion, rendered by Chief Justice Rugg, held (*a*) that the effect of the Joint Resolution of Congress and the Proclamation of the President was to vest the possession and control of the telephone properties in the Postmaster General on behalf of the United States to the "exclusion of every private interest;" (*b*) that the United States is a necessary party to the suit, (*c*) and that the United States not having consented to be sued the complaint must be dismissed (R. 26–30).

No. 967—the South Dakota Case—This case was submitted to the Supreme Court of the State upon the pleadings, and the court on March 24, 1919, by a majority decision (three judges concurring and two dissenting), adjudged and decreed that an injunction issue against the defendants as prayed; that the suit is not against the United States but is one against the several corporations to restrain the commission of an act not authorized under the laws of the United States and which would be in violation of the laws of the State; and decided against the authority in the Postmaster General under the resolution of Congress and in favor of the validity of the statutes of the State of South Dakota. (Majority opinion, R. 37–40; dissenting opinion, R. 40–45.)

POINTS INSISTED ON IN THE MASSACHUSETTS CASE, NO. 957.

The Supreme Judicial Court of Massachusetts ruled correctly in holding the suit to be in effect one against the Government.

ASSIGNMENTS OF ERROR IN THE SOUTH DAKOTA CASE, NO. 967.

1. The Supreme Court of South Dakota erred in holding that the suit is not one against the United States without its consent.

2. Said court erred in holding that the term "lawful police regulations" in the second proviso of the Joint Resolution approved July 16, 1918, is used therein in the broad sense which includes the power of rate making.

3. Said court erred in holding that, under said resolution, the power to fix intrastate rates and charges of telephone systems of which the President had assumed possession, operation, and control was not vested in the President, or his representative, the Postmaster General.

4. Said court erred in holding that the police regulations of South Dakota extend to or affect schedules of toll rates for telephone service promulgated by the Postmaster General, and in not holding that such regulations are not authorized by said proviso to said resolution of July 16, 1918.

5. Said court, having held that the statutes of said State applied to rates made by the Postmaster General, erred in not holding that said statutes so construed were in conflict with said Joint Resolution and were superseded thereby as to rates made by the Postmaster General.

6. Said court erred in failing and refusing to decide and find that the South Dakota State Railway Commission has been granted by the Legislature no control over telephone systems operated by the Federal Government.

7. Said court erred in failing and refusing to adjudge and decree that the defendants, their officers, agents, and servants are, during the period of Federal control, the officers, agents, and servants of the United States and subject only to the orders, direction, and control of the Postmaster General and of the President.

8. Said court erred in granting the injunction (R. 967, 54–56).

These assignments of error present all points involved in both cases.

ARGUMENT.

I.

These suits are in effect against the United States and therefore not within the jurisdiction of the courts. They seek an injunction which, if granted, will restrain the United States in the use of property, its right to possession and operation of which is not attacked, and would compel the United States to furnish service, at risk of loss, on rates it has superseded.

Whether a suit is one in effect against the United States and not maintainable because the United States is not and can not be made a party thereto, will be determined by its substantial character and not by its formal title or parties.

This is so notwithstanding the fact that the defendant named is a Cabinet officer, or his appointee, and not the United States *eo nomine*.

These suits are against the defendants who are operating as appointees and agents of the Government, under the authority of the Proclamation of the President of the United States, and under the direct orders and appointment of the Postmaster General. The defendants named have no personal interest in the result of the suits. Their compensation as owners of the property taken from their possession and being operated by the Government is fixed, and is not dependent upon the results of such operation. If the granting of the injunction sought in these cases should require the Government to operate these properties at a loss, such loss

must be borne by the Government. In its effect upon the financial result it is the United States which is affected and not the defendant companies. Even if it could be claimed that the defendants had an interest, it would none the less be evident that the great and ultimate interest in these operations and in the rates affected by these suits is in the United States. It is inconceivable that the decision, directly affecting and controlling the revenues which will come into the possession of the officers of the United States for its benefit and use in conducting the operations of these properties, should be made by the court without the United States being a party to the suit. It has not consented to be sued, and no officer or agent of the United States has been authorized to make it a party and submit its interest to the judgment of the courts. *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

The cases holding that injunctions so affecting the interests of the United States can not be granted against individuals in possession of, and operating, property to which the United States has the right of possession are numerous.

Where an injunction was sought against the commandant of a navy yard to prevent the use of gates manufactured and used by the United States through him, which it was claimed infringed a patent, this court said:

> No injunction can be issued against officers of a State to restrain or control the use of property already in the possession of the

> State * * * or where the state has otherwise such an interest in the object of the suit as to be a necessary party. (*Belknap* v. *Schild*, 161 U. S. 10.)

A patentee can not secure an injunction against a postmaster to prevent his using an infringing device in his possession for canceling stamps. *International Postal Supply Company* v. *Bruce*, 194 U. S. 601. The Court said:

> In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property, a right *in rem*, in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right can not be interfered with behind its back and, as it can not be made a party, this suit, like that of *Belknap* v. *Schild*, must fail.

The two cases just cited were cases in which the right of the complainant was assumed to be unquestionable and in which the defendant relied on no Act of Congress.

A State which operates a sugar plantation can not maintain a petition for mandamus against the Secretary of the Treasury to prevent him from demanding and collecting illegal rates of duty, because such a suit is in its essence a suit against the United States. *Louisiana* v. *McAdoo*, 234 U. S. 627.

In *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222, it was held that a person who claims a vessel in the pos-

session of the Secretary of the Navy on the ground that he has made a valid contract for it can not obtain a writ of mandamus against the Secretary, because:

> The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and as it cannot be made a party, this suit must fail; *Belknap* vs. *Schild*, 161 U. S. 10; *International Postal Supply Co.* vs. *Bruce*, 194 U. S. 601, 606; *Oregon* vs. *Hitchcock*, 202 U. S. 60, 69; *Naganab* vs. *Hitchcock*, 202 U. S. 473, 476.

In *Hopkins* v. *Clemson College*, 221 U. S. 636, the court held that the plaintiff could recover from the defendant claiming to be an agent of the state for damages resulting from the tortious act of the defendant in erecting an unlawful dyke on land of the State, by which the plaintiff's land was overflowed; but that an injunction could not issue to remove the dyke. The Court said (pp. 642, 648):

> No suit, therefore, can be maintained against a public officer which seeks to compel him * * * to do any affirmative act which affects the State's political or property rights.
>
> The plaintiff prayed not only for damages but that the embankment should be removed. The title to the land and everything annexed to the soil is in the State * * *. The State, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court

> can not decree the removal of the embankment which forms a part of the State's property.

The distinction between a liability for damages and a right to proceed by suit in equity is in accord with the distinction drawn by the court in *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 456, where the Court, in speaking of an action at law, says:

> It is no answer for the defendant to say I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority.
>
> Courts of equity proceed upon different principles in regard to parties. As was said in *Barney* vs. *Baltimore*, 6 Wall. 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in *Shields* vs. *Barrow*, 17 How. 130, "They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."
>
> "In such cases," says the court in *Barney* vs. *Baltimore*, 6 Wall. 280, "the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In *Wells* v. *Roper*, 246 U. S. 335, the court dismissed a bill in equity for an injunction to restrain the First Assistant Postmaster General from annulling a contract made between the plaintiff and the Postmaster General acting for the United States, and from interfering between the plaintiff and the United States in the performance of the contract. The Court said (p. 337):

> The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties.
>
> That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain.
>
> Neither the question of official authority nor that of official discretion is affected, for present purposes by assuming or conceding, for the purposes of the argument, that the

proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.

While the defendants in the case at bar are in possession, they hold only in their character as agents of the United States and for the purpose of operating the property for the United States. They are in possession under a resolution of Congress and by a specific order of the President issued thereunder. The right to so possess and operate is not attacked.

The cases are wholly different from suits such as *United States* v. *Lee*, 106 U. S. 196. In that class of cases the right to possession of the individual defendants is attacked by persons claiming title and right of possession, and asserting that the defendants are wrongfully in possession as trespassers. To the defense that defendants are in possession representing the Government, it can be replied that the defense claimed does not exist either because the act under which authority is claimed is unconstitutional, or because the same did not authorize the taking possession of the particular property.

But even in such cases if the suit is one which in effect grants affirmative relief, or compels action by the Government at its expense, the suit is considered one against the Government and can not be maintained. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 16–17.

These cases are unlike those where an officer in excess of authority is invading the property of an-

other or is withholding property from another to which the other person has a right, and are therefore different from such cases as *School of Magnetic Healing* v. *McAnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

In the first of these cases the complainant was seeking possession of its conceded property withheld by the Postmaster General under a mistake of law. The United States made no claim to it. In the second the injunction was to restrain the taking of complainant's property, admittedly his, by an officer in excess of the power delegated.

Here the effort is to require the United States to carry on business with property which it lawfully possesses and prevent it from fixing the price it deems reasonable for service it must furnish.

The interest of the United States in the subject matter of these suits and its relation as a necessary party is most clearly stated in the opinion of the Supreme Judicial Court of Massachusetts in the case now under review on writ of certiorari. We quote from the opinion as follows (R., p. 29):

> The reasonableness and amount of the rates to be charged for intrastate toll telephone service are of direct concern to the United States. As was said in *Wells* v. *Roper*, 246 U. S. 335, at 337, "that the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely

plain." In *Louisiana* v. *McAdoo*, 234 U. S. 627, at 629 are found these words: "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387." These statements but summarize the effect of earlier and exhaustive discussions of the principles applicable to states of facts so similar to those presented in the case at bar as to be indistinguishable. *Belknap* v. *Schild*, 161 U. S. 10, and cases there reviewed by Mr. Justice Gray. *Louisiana* v. *Garfield*, 211 U. S. 70, 77. *Oregon* v. *Hitchcock*, 202 U. S. 60. *Naganab* v. *Hitchcock*, 202 U. S. 473. The circumstance that the United States is not the owner of the system of the defendant but only rightfully in possession of it with the right to collect reasonable tolls is immaterial in this connection. "It has a property, a right in rem * * * which, though less extensive than absolute ownership, has the same incident of a right to use." *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606.

It is evident the direct result of the present suit is to not only deprive the United States of the revenues to be derived from its operation of these properties, but to require it to pay any deficit from the Treasury of the United States.

The President, having taken possession and control, is required to operate these properties. A decree enjoining the new rates and commanding the observance of the former lower rates, of necessity compels the operation at such lower rates.

It is submitted that the decision of the Supreme Judicial Court of Massachusetts holding that the suit was in effect one against the United States and therefore not maintainable was correct and should be affirmed, and that the contrary decision by the Supreme Court of South Dakota was erroneous.

While not involved in the legal question, it is interesting to note that there is no allegation in these cases that the rates proposed are unreasonable. It affirmatively appears in the South Dakota case that the rates, which that decision would maintain, are the subject of question and investigation by the Commission itself.

II.

The purpose and effect of said Joint Resolution and Proclamation was completely and exclusively to vest the possession and control of defendants' telephone systems in the President through the Postmaster General as his appointee on behalf of the United States.

The bills of complaint wholly fail to recognize that the defendant telephone companies in the several States have ceased to operate the telephone lines as common carriers and in fact are acting only as instrumentalities or agencies of the United States in the operation of said properties by the President through the Postmaster General. It will assist to

an understanding of the true nature of these proceedings to review briefly the several steps involved in the taking over of the telephone systems.

On April 6, 1917, Congress declared a state of war between the United States and the Imperial German Government, the declaration providing, among other things, that "to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." (40 Stat. 1.)

In furtherance of said declaration Congress on July 16, 1918, adopted the aforesaid Joint Resolution authorizing the President, whenever he deemed it necessary for the national security or defense, to take possession and assume control of any and all telegraph and telephone systems "and to operate the same in such a manner as may be needful or desirable for the duration of the war." (40 Stat. 904.)

Acting under and by virtue of said Joint Resolution, and of all other powers thereto him enabling, the President by a proclamation dated July 22, 1918, took possession and assumed control, as of midnight on July 31, 1918, "of each and every telegraph and telephone system and every part thereof, within the jurisdiction of the United States."

The President, among other things, directed that the control and operation of said systems should be exercised by and through the Postmaster General, and that the latter might perform such duties, so long and to such extent as he might determine, through the

owners, officers, and employees of the several companies.

As a result, from and after midnight on July 31, 1918, defendants in their corporate right ceased to be engaged in the operation of their respective telephone systems, and from said day up to and including the filing of the bills of complaint herein, have not been and are not now operating (in their corporate right) any telephone exchanges or facilities in the several States, but are acting alone as agencies of the Government in the operations conducted by the President.

Defendants' officers and employees since said date have been in charge of their respective telephone systems, and have been transacting the usual business of such systems solely as agents or representatives of the Postmaster General on behalf of the United States.

The Postmaster General may at any time, without notice to said defendant telephone companies, wholly remove said companies from all connection with the operation of said telephone systems, and substitute other persons in place of said companies, or may at any time direct that said telephone systems cease to be operated in the name of defendant companies.

The purpose and effect of said resolution and proclamation, therefore, was completely and exclusively to vest the possession and control of the several telephone systems in the Postmaster General, as the immediate representative of the President, on

behalf of the United States. As said by Chief Justice Rugg, of the Supreme Judicial Court of Massachusetts, in *McLeod* v. *New England Tel. & Tel. Co.* (R., No. 957, pp. 28–29):

> It seems manifest from this narration of facts and recital of official documents that the United States is vitally interested and is alone concerned in the toll rates to be collected for telephone service over the system belonging to the defendant. The resolution of Congress of July 16, 1918, is most comprehensive in scope. It authorized the President to take full, complete, absolute and unqualified possession of the defendant's system. It seems to us that the proclamation of the President according to its true construction was coextensive in its sweep with the power conferred by the resolution. By express words the President took possession and assumed control of every part of each and every telephone system including all equipment and appurtenances and all materials and supplies. It would be difficult to employ words of broader reach or wider embrace than those in which the proclamation is couched. The phrase of the bulletin of the postmaster general is equally comprehensive in its grasp. The effect of these documents was not a mere public supervision of an operation by private owners. It was a complete assumption of absolute and complete possession and control to the exclusion of every private interest. No distinction is made by their terms between interstate service and intrastate service. Both

alike are taken into the possession of the United States. Powers so extensive as were thus assumed can be exercised only through various governmental agencies. But the right and power of the government are paramount and admit of no associates. In execution of the authority conferred by the resolution of July 16, 1918, just compensation for that which has been taken from the defendant has been awarded by the President and accepted by the defendant. Its interest has come to an end as to the matter of charges to be exacted for the service rendered by the United States for the use of the property of the defendant. The government has utterly supplanted the defendant in this field. The matter of rates is now the sole financial affair of the United States.

III.

The taking possession and assuming control and operation by the President under the joint resolution of July 16, 1918, constituted said systems public utilities operated by the Government, and made it the right and duty of the President and his representative to fix the charge to be paid for service.

The general plan of Congress in utilizing the transportation systems of the country as a part of its resources in the prosecution of the war, and the essential part in its conduct filled by the taking possession thereof by the President, is fully set forth in the briefs filed in the case of *The State of North Dakota* v. *Hines, Director General, et al.*, No. 976, which are prayed to be considered in connection herewith.

The taking over of the telegraph and telephone lines succeeded this taking of the railroads while the stress of the war was at its greatest, and the control of these instrumentalities of commerce and transmission of communication was most important both to promote the Government activities and aid in the national security.

The taking of the lines was complete and brought all of their uses under the operation of the Government. Their use by private persons was thus made subordinate to Government use. The operation of the lines thus became a part of the war activities of the Government, and the utilization of the public utilities in its prosecution.

In discussing the war power under the Constitution Madison says in the Federalist:

> With what color of propriety could the force necessary for defense be limited by those who can not limit the force of offense? If a Federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then, indeed, might it prudently chain the discretion of its own Government, and set bounds to the exertions for its own safety * * *. The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.

services and facilities of carriers within its borders are as broad and all-inclusive as the control of Congress over interstate transportation and facilities and services connected therewith; (citing cases) for the exclusive rights and powers of the states over their own territories were established with the beginning of our government. he people of the United Colonies in separating from Great Britain, changed the form, but not the substance of their government. As independent states, they retained, for the purposes of government, all the authority and prerogatives of the Parliament of England. They continued to and do now possess and enjoy all of those same powers, except those which have been surrendered and delegated to the United States through the adoption of the national Constitution.

Roberts Federal Liabilities of Carriers, Vol. 1, pages 68, 69, 70, 71.

During times of peace the Federal government possesses no power to regulate rates of telephone companies except that which is conferred on it by the commerce clause of the constitution.

Nothing is better settled in the law than that the commerce clause of the Federal Constitution is confined to interstate commerce, and that the power to to regulate domestic or intra-state commerce resides in the states. As was said in **2 Elliott on Railroads, paragraph 690:**

> "If the places from which the passengers or property are transported are within the State, and the places to which they are carried are also within the State, the transportation being wholly therein, the commerce is domestic and not inter-state commerce, and, as domestic comerce, is subject to State control."

In **The Louisville, New Orleans and Texas Railway Company vs. State of Mississippi, 133 U. S. 587, 33 L. Ed. 784,** a statute of Missippi requiring railroads carrying passengers in that State to provide equal but separate accommodations for white and colored races, by providing two or more passenger cars to each passenger train or by dividing the passenger cars by a partition so as to secure separate accommodations, was alleged to be in contravention to the commerce clause of the Federal Constitution. Under the construction of the highest Court of Mississippi it was held that the act applied only to intra-state commerce. On appeal to the Supreme Court of the United States, it was held that the act applying only to such commerce it was not in contravention to the commerce clause of the Federal Constitution. (Opinion page 591, L. Ed. 785).

> "No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the

power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commer clause.

"It has often been held in this Court, and there can be no doubt about it, that there is a commerce wholly within the State, which is not subject to the constitutional provision, and the distinction between commerce among the states and other class of commerce between citizens of a single state and conducted within its limits exclusively, is one which has been fully recognized in this Court, although it may not be always asey, where the lines of these classes approach each other, to distinguish between the one and the other. (Citing cases).

"The statute in this case, as settled by the Supreme Court of the State of Missippi, affects only such commerce within the State, and comes therefore within the principles thus laid down."

The same principles apply to telephone companies where messages are transmitted to points wholly within the State, and where in such transmission State lines are not crossed.

See also—

Western Union Telegraph Company vs. Texas, 105 U. S. 460, 26 L. Ed. 1067.

Hall vs. De Cuir, 95 U. S. 485.

The national legislative body has therefore no power to regulate or control carriers engaged exclusively in intra-state commerce. he Federal government cannot take over, regulate or control carriers engaged solely in intra-state commerce during times of peace, without an amendment to the National Constitution, but in times of war no such limitations upon the powers of Congress exist. The Constitution provides that Congress may declare war and enact all laws which shall be necessary and proper to carry on the war.

The power to declare war carries with it as an incident thereto, and inseparable therefrom, the right to prosecute the war by all the means known to, and recognized by all ,civilized nations. It is admitted that Congress might, under its powers to declare war and prosecute war by all the means known to, and recognized by, civilized nations, take over exclusively and for government purposes and for prosecuting a war to a successful end, the entire system of a telephone company. But certainly under no powers granted to Congress by the Constitution for the purpose of prosecuting a war, could Congress assume to take over a telephone system and regulate the rates for messages of private citizens between points within a state. By no straining of the definition of terms can the fixing of rates to telephone users be said to be a "war measure."

> "The constitution was not, therefore necessarily carved out of existing state sovereignties, not a surrender of powers already existing in state institutions, for the

powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares, that 'powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' "

Per Story, J., in Martin vs. Hunter's Lessee, 1 Wheaton 304; 4 L. Ed. 97.

THE ATTEMPT TO REGULATE RATES CAN NOT BE SUSTAINED AS A REVENUE MEASURE.

On this subject the Indiana court in the case of State of Indiana v. Indianapolis Phone Co. (not yet reported) well said:

"We suppose it is clear that when a person having the right under the existing state law to use a telephone for one dollar is required to pay two dollars for that service,

> or when the people of a state, being entitled to a certain telephone service for five million dollars are required to pay ten million dollars for that service, they are deprived of a property right, unless their property right in the service at the cheaper rate has ceased to exist. And under the fifth amendment to the Constitution of the United States, Congress has no power to take property or property rights for public use 'without just compensation.' "
>
> U. S. Const., Amend. 5.

And it could hardly be claimed that this court has judicial knowledge that the users of telephones are compensated by reason that the service given is now twice as good as it was before. The persons, within the State of Pennsylvania, selected without reference to the comparative numbers of such persons in Pennsylvania and in other states, and without reference to any facts concerning them except the tolls they pay for the use which they make of the telephones for messages wholly within the State, and without reference to their respective incomes, could not be required to contribute in that manner to the revenues of the United States from which to pay the expenses of its taking over and operating the telephones, under the taxing power, for the Constitution (Article 1, Sec. 8) requires that "all duties, imposts and excises shall be uniform throughout the United States"; and that "no capitation or other direct tax shall be laid, unless in proportion to the census" (Const. Art. 9), with the single exception that an income tax may

be imposed (Amendment 16). And to impose an extra dollar on the man who used the phone once for a call to Birmingham, and five hundred dollars on the man who did large telephone business, and nothing at all on the person who did not use the telephone for distance calls would not make the taxation either "uniform" or "in proportion to the census." Moreover, all bills for raising revenue shall originate in the House of Representatives (Article 1, Sec. 7) under which provision taxes can only be laid by a bill originating in that house, and not by a joint resolution, and anything else but such a bill, so originating, is void.

United States, ex rel. v. James, 13 Blatch. 207, 26 Fed. Cas. No. 15, 464;
Hubbard v. Lowe (1915), 226 Fed. 135.

II.

THE POSTMASTER GENERAL HAS NO POWER TO REGULATE AND FIX RATES OF TELEGRAPH AND TELEPHONE COMPANIES UNDER THE WAR POWERS OF THE PRESIDENT CONFERRED BY THE CONSTITUTION.

The plaintiff in his Bill of Complaint alleges as a source of his authority to regulate and fix rates, the war power of the President of the United States.

We contend that no war power of the President authorizes the regulation of rates to be charged citizens of a State, for telegraph and telephone service.

The Constitution of the United States confers certain war powers upon Congress and certain war powers upon the President. Those conferred upon Congress are the following:—

"That Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States * * * * *;

"To declare war, grant letters of marque and repraisal, and make rules concerning captures on land and water;

"To raise and support armies;

"To provide and maintain a navy;

"To make rules for the Government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions;

"To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States * * * * *;

"To make all laws which shall be necessary for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof." (Article 1 ,Section 8.)

"The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." (Article 2; Section 2.)

"He shall take care that the laws be faithfully executed." (Article 2; Section 3.)

We do not contend that the war power of the President may not become extensive. According to the emergency, the President, we believe, has power in time of war to take and utilize such private property as may be necessary for the supply and maintenance of troops in the field, or the seasonable movement of the army and navy to such places as he deems necessary to conduct the campaigns. The coming of war intensifies and broadens his powers in extent and in freedom of action, and ability to deal summarily with new conditions as the military or naval emergency may demand; but we assert that war does not change the President's powers as to their kind or nature, or operate automatically to transfer to him powers essentially legislative in character, even concerning matters with some aspects of which he deals by virtue of the exigencies of the military command. He continues to be, even as to military matters, the official charged supremely with seeing to it that the laws are faithfully executed.

The power "to provide ways and means" for carrying on the war, to promote "the legislation essential to the prosecution of the war with vigor and success" remains in the Congress, which is clothed with full authority to make all laws necessary and proper for carrying into execution the powers vested in Congress and other Departments of the Government. It is the Congress which is vested with the "power to * * * raise and support armies," and this extends to all the facilities of their equipment, maintenance and transportation to camp or battlefield, and their general effectiveness in the field.

It is undoubtedly the function of the Congress to make available to the President the moneys, supplies, facilities of transportation and other instrumentalities requisite for the carrying on of the war; the President's powers as to such facilities and instrumentalities are based upon the requirements of a military or naval emergency and not upon the mere existence of a state of war.

The Federal power to regulate rates or to prescribe rates, whatever its limits may be, is a legislative power exclusively. As was said by Mr. Justice Moody in **Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, on page 7, L. Ed. 378:**

> "* * * the function of rate making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. Prentis v. Southern R. Co. 211 U. S. 210, 53 L. Ed. 150; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. Ed. 186,"

and the legislative authority, even as to concerns directly and exclusively military, "is not a part of the power conferred upon the President by the declaration of war."

The sweeping character of the war powers of the Congress even in limitation on those of the Execu-

tive, was long ago expressed by Chief Justice Chase (Ex Parte Milligan, 4 Wall, 2). 18 L. Ed. 281.

"Congress has the power, not only to raise and support armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and conduct of campaigns. That power and duty belong to the President as the Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. * * * The power to make the necessary laws is in Congress; the power to execute in the President. Both imply subordinate and auxiliary powers. Each includes all authority essential to its due exercise."

The existence of war does not suspend the operations of legal remedies applicable to persons resident within the same belligerent areas. 40 Cyc. 329.

Edmondson v. Union Bank, 33 Ga. 91;
Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657.

"It is an unbending rule of law, that the exercise of the military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency required."

Raymond v. Thomas, 91 U. S. 712, 716, 23 L. Ed. 434, 436, citing Mitchell v. Harmony. 13 How. 115.

"The right of the President temporarily to govern localities, through his military offices, is derived solely from the fact that he is commander-in-chief of the army and is to see that the laws are executed; and he can exercise it to just the extent that, and no further than, by the laws of war, a commanding general in the Army of the United States could do it. Where the laws are, or may be executed without the interference of the President, by his military, he has no right thus to interfere."

Griffin v. Wilcox, 21 Ind. 370, 382.

And authorities are numerous to the effect that the President has no "War Power" to override the Constitution, or to do any acts in peaceful communities far from the actual strife of arms except by authority of laws duly enacted by Congress, acting within its constitutional power. If it should be found that the acts done were without any authority of law, under the Constitution, but depend solely upon a supposed "war power" to disregard the Constitution, at a time when the courts are open throughout every portion of the State of Pennsylvania, and every part of the United States, and when no hostile armed soldier is in or near our borders, then the language of the Supreme Court of Kentucky would be applicable, as follows:

"No citizen or soldier can shield himself

from responsibility for his wrongful act by pleading an unconstitutional order of the President of the United States, authorizing the act complained of."—**State of Indiana vs. Indianapolis Phone Co.** (not yet reported.)

Eufort v. Bevins, 64 Ky. (1 Bush) 460.

In Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, holding as unconstitutional the Child Labor Act of Congress the Court said:

"The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the Nation by the Federal Constitution."

"In interpreting the Constitution it must never be forgotten that the Nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National government are reserved. The powers of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of Congressional authority over interstate commerce, but would sanction an invasion by

the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

"This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

"The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

In the case of Commonwealth, Ex Rel. William I. Schaffer, Attorney General, vs. The Bell Telephone Company of Pennsylvania, before referred to, the Court in discussing the war power of the President said:—

"We have stated that the defendant company and the United States District Attorney also assert that the Postmaster Gen-

eral's power to change the rates which were theretofore adopted by the company and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States which makes the President thereof the Commander-in-Chief of the army and navy.

Under the provisions of the constitution there can be no question that the President of the United States is empowered as Commander-in-Chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of the war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as Commander-in-Chief of the army

and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the State authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but is acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interference with him as an official or with his official action and therefore would not be against the Federal government. Where the authority to do the act complained of is challenged the suit is not against the United States. Phila. Company vs. Stimson, 223 U. S. 605, 56 L. Ed. 570, United States vs. Lee, 106 U. S. 196, 27 L. Ed. 171. If he be acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

"But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This

proposition seems to be settled to the contrary in Mitchell vs. Harmony, 13 Howard, 115, 14 L. Ed. 75: Little vs. Barreme, 2 Cranch, 170, 2 L. Ed. 243. In the former case it was said, 'our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it clear that the law does not permit it.' If this be so as to the taking of property, it must be equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purpose having no apparent or direct relation to the prosecution of the war, it must be shown, we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges

and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the Congressional Resolution shows that in the opinion of Congress there existed no military necessity for changing the rates.

"It may be conceded that the courts have no power to review the President's official discretion in operating the Company for war purposes, but a different question is presented when it is claimed that in changing the rates and attempting to enforce the unapproved rates, he is acting beyond his powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes, he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if

he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or security and if he may not, as President, because of his office, be subjected to injunction or to the process of the Courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amenable to judicial process.

"We recognize the fact that there may be many cases involving the exercise of the President's war power where a Court of Equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national security or defense, and this is true, consequently, with respect to the rates chargeable for such use. They are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public."

The opinion of Judge Kunkel is so informing that we print it in its entirety at the end of this brief.

While it may be technically true that the war

has not ended because no formal treaty of peace has been signed, yet the war potentially has ceased and the emergency is over. Will this court halt a sovereign state in requiring obedience to its laws in a matter purely of local control, upon the vague assertion of a "war power" by a federal official with no allegation, much less proof, of an emergency calling for such an extraordinary and unheard of proceeding as this.

In its final analysis, what the Federal authorities in this proceeding call "war power," is really martial law, which has no place in our governmental existence save only when governmentally, we are "backs to the wall" and self preservation and necessity is the only code.

It is solemnly suggested to the court that America is not the place and that this instant hour is not the time, for the encouragement of novel experiment in forms of government; and that a heavy burden rests, and by right ought to rest, on any one who seeks to remove the ancient land mark which the fathers have set. The State of Pennsylvania bows to the reign of law, but now, as never before, the known certainty of the law is the bulwark, as well as the safety of all. The advocate of new methods, rather than he who plants himself on time honored principles, must establish his right. The thing which Congress authorized Postmaster General Burleson to take, any man with money enough could buy—that is, the control of the wire companies. The thing which he assumed is government itself, and he assumes it in the face of the

express reservation out of the grant of this very function of government.

BERNARD J. MYERS,

Deputy Attorney General.

WM. I. SCHAFFER,

Attorney General of the Commonwealth of Pennsylvania.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNA.

Sitting in Equity.

Equity Docket No. 631.

Commonwealth Docket, 1919, No. 1.

COMMONWEALTH OF PENNSYLVANIA, EX. REL., WILLIAM I. SCHAFFER, ATTORNEY GENERAL, PLAINTIFF vs. THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, DEFENDANT.

KUNKEL, P. J., April 2, 1919:

The Attorney General has filed this bill in behalf of the Commonwealth and seeks thereby to restrain the defendant company from charging rates for the use of its lines within the State different from those approved by the Commonwealth's Public Service Commission. A preliminary injunction was granted and the case is now before us on a motion to continue the same. The defendant has filed its answer in which it denies that it has any control over its lines or is now operating them, except under the direction and orders of the Postmaster General who has taken possession of and is operating them, and that the changed rates and toll charges are being enforced by him. It disclaims any responsibility for the operation of its lines under the new and unapproved rates. The jurisdiction of the Court also is questioned in a plea filed by the United States Attorney.

The Postmaster General in taking and assuming the control of the defendant's lines and in operating its systems, acted under the proclamation of the President of the United States issued July 22, 1918, to the effect directing that the supervision, possession, control and operation of telephone systems shall be exercised by and through the Postmaster General, said "Postmaster General may enforce the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine through the owners, managers, Board of Directors, receivers, officers and employees of said telegraph and telephone sys-

the Postmaster General by an order known as No. 2495 issued December 12, 1918, directed that the rates for toll service over the defendant's telephone lines should be charged and computed according to a standard schedule set forth in the order, which rates were not approved by the Commonwealth's Public Service Commission as required by the Public Service Company Law (P. L. 1913, p. 1374) and were different from those approved and theretofore in force. The President's proclamation was issued pursuant to a joint resolution of Congress, approved July 16, 1918, which provides that: "The President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine, cable or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of the ratification of the treaty of peace. Provision is also made in the resolution for the payment of compensation to the persons affected for the use and operation of the systems. The resolution further provides that nothing in this Act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transmission of Government communication or the

issue of stock or bonds by such system or systems." Thus it appears the President is authorized when he shall deem it necessary for the national security or defense, to take under his control and operate in such manner as may be deemed needful or desirable, for the duration of the war, the defendant's telephone system; and the duration of the war is practically defined to extend to the date when the President shall proclaim the exchange of the ratification of the treaty of peace. The time when he shall exercise his authority and the manner of its exercise is committed to his judgment and discretion. However, the period during which he may exercise his authority is limited and he may not in exercising it, impair or affect the lawful police regulations of the States.

The action of the President in taking possession, assuming control and supervision of the telegraph and telephone systems within the jurisdiction of the United States is stated to be not only under and by virtue of the power vested in him by the Federal resolution but by all other powers thereto him enabling. The Commonwealth contends that the powers thus conferred may not be exercised at the present time because the war during which they were to be exercisd is at an end; that the resolution did not contemplate a change of defendant's rates and tolls by the President when authority was granted him to operate its lines; that the resolution of Congress has been misconstrued, as it specifically provides against the impairment or change of existing laws of the States in relation to taxation or the lawful police regulation of the several states, and that the required ap-

proval of the defendant company's rates by the Public Service Commission is one of the Commonwealth's police regulations. The defendant takes issue on these propositions and insists that the President's power to do the act complained of arises not only out of the resolution of Congress referred to, but also inheres in his office as Commander-in-Chief of the army and navy, which no Act of Congress can constitutionally limit. It further objects to the proceeding as being one in effect against the United States which has not consented thereto. The controversy is therefore over the power of the President and Postmaster General to change the rates from those approved by the Public Service Commission of the Commonwealth and in force prior to and at the time the defendant company was taken into their control and operated by them; and also over the jurisdiction of the Courts to interfere with them in so doing.

As has been said, it is averred and not denied that the officers of the company are not operating it or attempting to enforce the new rates and tolls, but it is contended on the part of the Commonwealth, that although not acting of their own motion but merely as a means and instrumentality, they are acting at the behest of the Postmaster General representing the President, and are thus assisting and abetting him in enforcing the changed tolls and to that extent they should be enjoined.

We have stated that the defendant company and the United States District Attorney also assert that the Postmaster General's power to change the rates which were theretofore adopted by the com-

pany and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States which makes the President thereof the Commander-in-Chief of the army and navy.

Under the provisions of the constitution there can be no question that the President of the United States is empowered as Commander-in-Chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as Commander-in-Chief of the army and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under

his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the State authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but is acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interference with him as an official or with his official action and therefore would not be against the Federal Government. Where the authority to do the act complained of is challenged the suit is not against the United States. Phila. Company vs. Stimson, 223 U. S. 605, United States vs. Lee, 106 U. S. 196. If he be acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This proposition seems to be settled to the contrary in Mitchell vs. Harmony, 13 Howard 115; Little vs. Barreme 2 Cranch, 170. In the former case it was said "our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." If this be

so as to the taking of property, it must be equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purpose having no apparent or direct relation to the prosecution of the war, it must be shown we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the Congressional resolution shows that in the opinion of Congress there existed no military necessity for changing the rates.

It may be conceded that the courts have no power to review the President's official discretion in operating the company for war purposes, but a different question is presented when it is claimed that in changing the rates and attempting to enforce the unapproved rates, he is acting beyond his

powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or security and if he may not, as President, because of his office, be subjected to injunction or to the process of the courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amenable to judicial process.

We recognize the fact that there may be many cases involving the exercise of the President's war power where a Court of Equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national security or defense, and this is true, consequently, with respect to the rates chargeable for such use. They

are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public.

It may be suggested that it is the duty of the President while in control of the defendant's lines to so operate them as to result in the least loss to its business. This may be true, but would hardly justify the change of the rates chargeable to others for the use of the lines when, in the absence of any proof on the subject, the rates fixed by the Public Service Commission, whose duty it is to pass on the question, must be presumed to be fair, reasonable and adequate between the company and its patrons. If they were not, there is no doubt on applying to it the Commission would have afforded ample relief.

It is also asserted that the President of the United States and his Postmaster General were warranted in changing the rates approved by the State authorities by the Federal Resolution which authorized the taking over, possession, control and operation of the defendant company's system of lines. It is important, therefore ,to examine into the Federal resolution and to ascertain whether it will bear the construction which they have put upon it. The very resolution to which they appeal for justification of their act expressly provides that in acting under it, the State's police regulations shall not be impaired. Here is an express prohibition against interference with the rates of the defendant company; for it cannot be successfully disputed that the regulation of rates by State

law is a police regulation. The suggestion that the police regulations referred to in the proviso mean police regulations other than those relating to rates and tolls is not tenable. To so hold would be practically to nullify the proviso. We cannot understand a construction which would hold the reference to be to that which is remotely rather than to that which is closely allied to the subject of the legislation. What we have said with respect to the relation of the rates and tolls chargeable by the company to the use of the lines for war purposes and for the national security and defense, under the Presidential power is applicable also to the use of the lines under the Federal resolution, even if no effect be given to the proviso. It is quite clear that the resolution did not contemplate an interference with the rates and tolls in force at the time it was passed. If it had made no declaration on the subject we would not assume that it intended to authorize the operation of the lines for purposes other than war purposes, or contrary to the laws of the State. Here too then it is evident that the President and his Postmaster General are acting beyond any power conferred upon them by the Federal resolution. It is no answer then to say that they were engaged in an official act, representing the government of the United States when they changed the rates and tolls chargeable for the use of the lines within the State by others, and may not therefore be interfered with or obstructed without the Government's consent.

It appears therefore that the change of the rates chargeable to the public has no effective relation to the use of the defendant's system for war pur-

poses or the purposes for which it was authorized to be taken over by the Federal authorities, either under the power of the President, as Commander-in-Chief, or under the Federal resolution.

The conclusion follows that neither the President nor the Postmaster General was acting officially in changing the rates and tolls, but they acted beyond the scope of their powers. In such case they are open to interference and prevention so far as lies in the power of the State Courts, especially in the present case where their act amounts to a disregard of the Commonwealth's laws and is an attempt to do that which the defendant company itself could not lawfully do.

It will hardly be questioned that the Commonwealth of Pennsylvania has the power to enforce its own statutes, and to prevent their violation; or that this Court has local jurisdiction to entertain the present bill for the purpose of preventing the violation of the order of the Public Service Commission. This right seems to be clear, Sect. 34, Act of July 26, 1913, P. L. 1429, Com. vs. Order of Solon, 166 Pa. 38; and we think anyone who undertakes to disobey the order should show such a state of facts as plainly justifies his action.

For the considerations stated which we feel are developed only in part, we are induced to continue this injunction until final hearing, when the facts of the case may be fully shown and the questions which have been raised may be more thoroughly discussed and considered.

Accordingly the motion to continue is sustained.

I fully concur in the foregoing opinion and conclusion.

Sam'l J. M. McCarrell, J.

In The

Supreme Court of the United States

October Term, A. D. 1918.

No. 957.

Writ of Error to Supreme Court of South Dakota.

DAKOTA CENTRAL TELEPHONE COMPANY

vs.

STATE OF SOUTH DAKOTA, ex rel., BYRON S. PAYNE, as Attorney-General, et al.,

AND

No. 967.

Certiorari to Supreme Court of Massachusetts.

FREDERICK J. MACLEOD and EVERETT E. STONE, Constituting the Public Service Commission of Massachusetts,

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

BRIEF ON BEHALF OF THE STATE OF MARYLAND.

Statement.

The Chesapeake and Potomac Telephone Company of Baltimore City, which furnishes local service throughout the State of Maryland, published advertisements in the daily papers of the City of Baltimore on April 15, 1919, that it would put into effect a new rate schedule on May 1, 1919. The Public

Service Commission of Maryland had previously approved and adopted a rate schedule, fixing the maximum rates for the various classes of telephone service furnished by the Chesapeake and Potomac Telephone Company, and was conducting an investigation for the purpose of revising this schedule. The investigation had, however, been postponed by the Commission, on application of the Telephone Company, until the unsettled conditions due to the war became stabilized. This postponement was made by the order of the Commission passed during the war, on December 6, 1917.

On July 23, 1918, the President, acting under the authority of the joint resolution of Congress, approved July 16, 1918, took possession of all telegraph and telephone lines, including that of the Chesapeake and Potomac Telephone Company of Baltimore City, and placed them in charge of the Post Master General. The latter assumed the power to increase intra-state rates without submitting them to the various State commissions. The rates which the Chesapeake and Potomac Telephone Company of Baltimore City put into effect on May 1, 1919, were, in accordance with this assumption, not submitted to the Public Service Commission of Maryland.

Under the Maryland law (Act of Assembly of Maryland of 1916, Chap 560), the Department of Law of the State, headed by the Attorney-General, has charge and supervision of the legal business of the State, but the provisions of that Act do not apply to the Public Service Commission of Maryland, which is expressly excepted therefrom. The Governor, upon the recommendation of the Commission, appoints the general counsel to the Commission (Annotated Code of Maryland, Vol. 4, Art. 23, Sec. 414). The Public Service Commission requested an opinion from its general counsel as to its rights in the matter of the proposed increase in rates, and on April 22nd, 1919, Hon. William Cabell Bruce, the general counsel to the Commission, advised the Commission that it had no jurisdiction, and it, therefore, took no action.

The Protective Telephone Association of Baltimore, a large and active business men's association, which had been

instrumental in the investigation before the Public Service Commission for the purpose of having reduced the Baltimore City telephone rates, after obtaining leave, filed a brief in these cases. Briefs have also been filed by leave of the Court on behalf of thirty-eight utilities commissions of the several States, and separate briefs have been filed by three or four States through their Attorney-General, all of these briefs being in addition to the briefs of the parties to the two cases. The reason for the general interest shown by the filing of these briefs, is that the same situation exists in practically every State in the country and the decision of this Court in these two cases will settle the question without the necessity of separate cases being filed in each State.

In view of the foregoing, I feel that the citizens of the State of Maryland as a whole should be officially represented before this Court in this matter, which is of vital interest to them. The Public Service Commission is precluded, by the advice of its counsel, from taking any action, and the Protective Telephone Association of Baltimore is, as I have stated above, a city business men's association and does not officially represent the State at all. I, therefore, as Attorney-General, ask leave to file this brief on behalf of the State of Maryland.

POINTS.

The questions involved in these cases are:

I.

Does the Resolution of July 16, 1918, Authorize the President and His Agents to Establish Maximum Intra-State Telephone Rates Without Regard to State Laws Requiring the Same to be First Submitted to and Approved by the Several State Utilities Commissions?

II.

ARE THE SUITS IN EFFECT SUITS AGAINST THE UNITED STATES IN CASES WHERE THERE IS NO EXPRESS STATUTE PERMITTING SUCH SUITS TO BE MAINTAINED?

I have presented these questions in the order named, because it seems to me that the decision of the first question will carry with it the decision of the second.

I.

DOES THE RESOLUTION OF JULY 16, 1918, AUTHORIZE THE PRESIDENT AND HIS AGENTS TO ESTABLISH MAXIMUM INTRA-STATE TELEPHONE RATES WITHOUT REGARD TO STATE LAWS REQUIRING THE SAME TO BE FIRST SUBMITTED TO AND APPROVED BY THE SEVERAL STATE UTILITIES COMMISSIONS?

The Resolution of July 16, 1918, authorizes the President, during the continuance of the war, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telephone system, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war. There follows a proviso for compensation, and then this proviso:

> "Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

The argument centers around the meaning of the words, "the lawful police regulations of the several States".

The Government contends that this phrase means regulations intended to protect the health, morals and safety of the public, and does not mean regulations passed in pursuance of the police power in its larger sense.

It is submitted, however, that the decisions of this Court do not sustain this position. The term "police regulations" is synonomous with "regulations to enforce the police power."

Thus, in a very early case, this Court had before it an Act of the Legislature of Iowa requiring railroad rates to be fixed, published and posted. A railroad company was sued for violations of these provisions. One of the defenses was that the Iowa statute was in conflict with the commerce clause of the Constitution of the United States.

No attempt was made by the State to control the rates that might be charged. This Court decided that such act was not a regulation of commerce. It said:

> "It is a police regulation, and as such forms 'a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general Government, all of which can be most advantageously exercised by the States themselves.' Gibbons vs. Ogden, 9 Wheat 1."
>
> Chicago & Northwestern Rwy. Co. vs. Fuller, 17 Wall. 560.

Again, in the great Grain Warehouse case, this Court said, speaking of the police powers of the State:

> "In their exercise, it has been customary in England, from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for service rendered, accommodations furnished and articles sold."
>
> Munn vs. Ill., 94 U. S. 113.

In a railway case, involving the right of the Railroad Commission of Texas to put into effect rates to be charged by the Texas and Pacific Railway Company, the right was upheld, as it had previously been in other cases. In that opinion, the following words were used, which, it is submitted, are suggestive as to the meaning of the Resolution of July 16, 1918:

> "* * * We are of opinion that the Texas and Pacific Railway Company is, as to business not wholly within the State, subject to the control of the State in all matters of taxation, *rates* and *other* police regulations."
>
> Reagan vs. Mercantile Trust Co., 154 U. S. 413.

The term "police regulation" was discussed in connection with a drainage statute of the State of Illinois. It was contended, in that case, that the decisions as to the *police power* of the State in relation to *public health, public morals* and *public safety* were not applicable to cases where the police power was exercised for *the general well-being of the community, irrespective of any question of health, morals or safety.* This Court refused to adopt that view, and said:

> "We hold that the police power of a State embraces *regulations* designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."
>
> Chicago, Burlington & Quincy Rwy. Co. vs. Ill., 200 U. S. 561.

It is clear from these decisions and from many others referred to in them, that rates are fixed by police regulations made by the States in the exercise of their reserved police power. The term "police regulations" is a familiar one in this Court and has been applied many times to those regulations which fix rates. Congress must be presumed to have known the meaning of the term. So knowing, it specially excepted from the power of the President, when he should take over the telephone companies, "the lawful police regulations of the several States." *It must have meant, by such language, those police regulations under which maximum rates had been fixed in Massachusetts, in South Dakota, in Maryland and in the other States.*

It is not desired to discuss the question of the power of Congress to authorize the President to fix rates, because it is submitted that it did nothing of the kind. In the exercise of

the war power, Congress could perhaps have authorized the taking over of the telephone lines and permitted no messages to be sent over them, except those relating to the war. It did not attempt to authorize the exercise of any such power, but left the people of the country in full use of their ordinary telephone facilities, except where government communications might be affected. In other words, Congress intended that the President should take over and operate the telephone lines of the country for the purpose of securing at all times safe and adequate means of communication in the conduct of the war, and for the purpose of preventing adequate means of communication to such of our enemies as might be within our borders. If, in accomplishing these objects, the cost of operating the various telephone lines increased, that cost should be paid by the people as a whole and should not be laid upon the telephone subscriber, who, in his capacity as a subscriber, had nothing to do with the war. In other words, the intention of Congress, evidenced by the Resolution of July 16, 1918, was to leave the telephone subscriber in the various States, in so far as rates were concerned, subject to the regulations existing before the President took over the various lines.

II.

Are the Suits in Effect Suits Against the United States in Cases Where There is No Express Statute Permitting Such Suits to be Maintained?

This question is involved in the first question, and its decision, it is submitted, will follow the decision of that question. If Congress did not intend to give the President and his agents the authority to fix rates, and if the agent of the President, acting in excess of his authority, is fixing rates, then these cases are similar to the case involving Arlington, where it was held that the military authorities holding the former residence of General Lee, were exceeding their authority, and, therefore, the suit was not one against the United States.

U. S. vs. Lee, 106 U. S. 196.

These suits were not brought against the President, or against his agent, the Postmaster General, because by the Proclamation of the President of July 22, 1918, under which he took over the telephone lines, he directed that the owners, etc., of the various telephone systems should continue the operation thereof "in the usual and ordinary course of the business of such systems, in the names of their respective companies, associations, organizations, owners or managers, as the case may be." The suits, therefore, are suits to compel the Telephone Companies within the States of Massachusetts and South Dakota to observe the laws of those States, and to prevent them from going beyond the authority given them by the Resolution of Congress and by the Proclamation of the President issued in pursuance thereof. The Companies claim the right to disregard the State regulations. They claim this right under the Act of Congress. If they are exceeding their authority under that Act, then they are not acting as agents of the Government, and the suit is not one against the Government. Therefore, the decision of this question necessarily follows the decision of the question first discussed herein.

CONCLUSION.

It is, therefore, respectfully submitted that this Court in deciding these cases should establish as the proper construction of the Resolution of July 16, 1918, and the Proclamation of July 22, 1918, that the President, the Postmaster General and the several Telephone Companies have not the authority to increase intra-state rates without the submission of the proposed new rates to the various bodies required by the police regulations of the several States to approve the same.

Respectfully submitted,

ALBERT C. RITCHIE,
Attorney-General of the State of Maryland,
Amicus Curiae.

NO. 957-967

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

FREDERICK J. MACLEOD and EVERETT E. STONE, Constituting the PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *vs.* NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	Certiorari to Supreme Court of Massachusetts.
and	
DAKOTA CENTRAL TELEPHONE COMPANY, *vs.* STATE OF SOUTH DAKOTA, ex rel., BYRON S. PAYNE, as Attorney General, et al.	Writ of Error to Supreme Court of South Dakota.

MOTION

of Charles E. Elmquist, a member of the bar of this court, for leave to file a brief amici curiae on behalf of the National Association of Railway and Utilities Commissioners, and his associate attorneys general, commerce counsel and state regulating commissions.

HAWKINS & LOOMIS CO., LAW PRINTERS, 162 W. MONROE ST., CHICAGO.

brief *amici curiae* on behalf of the National Association of Railway and Utilities Commissioners, the attorneys general, commerce counsel and the several state public service commissions, who are interested, as public officials, in the issues which are involved in this suit, since they affect the regulating laws and practices of most of the states in the Union and the authority therefor.

Printed briefs have been duly filed in this court and served upon the counsel for the plaintiff in error and the defendant in error.

Wherefore, said Charles E. Elmquist, prays that he may have leave to file a brief on behalf of the association and officers mentioned herein, as *amici curiae*, in support of the position of the State of South Dakota, *ex rel.*, Byron S. Payne, as attorney general, *et al.*, defendant in error, and the State of Massachusetts by Frederick J. Macleod and Everett E. Stone, constituting the public service commission, plaintiffs in error.

CHARLES E. ELMQUIST.

Dated at Washington, D. C., May 5, 1919.

SERVICE OF MOTION AND NOTICE.

A copy of said motion and notice have been served on counsel for plaintiff in error and defendants in error.

CHARLES E. ELMQUIST.

Washington, D. C., May 5, 1919.

NO. 957-967

IN THE

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vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Certiorari to Supreme Court of Massachusetts.

and

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vs.

STATE OF SOUTH DAKOTA, ex rel., BYRON S. PAYNE, as Attorney General, et al.

Writ of Error to Supreme Court of South Dakota.

BRIEF AMICI CURIAE OF THE SEVERAL STATES AND NATIONAL ASSOCIATION OF RAILROAD AND PUBLIC UTILITY COMMISSIONERS.

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BRIEF AMICI CURIAE OF THE SEVERAL STATES AND NATIONAL ASSOCIATION OF RAILROAD AND PUBLIC UTILITY COMMISSIONERS.

STATEMENT.

This brief is presented in behalf of thirty-seven states of the Union, represented by the several public service commissions, and by the National Association of Railway and Utilities Commissioners. All of the states except five had conferred juris-

diction upon public service commissions over telephone companies. The existing state laws vary somewhat in their language, but they are substantially alike. In general they confer upon the utility commissions the power to regulate all persons, firms, corporations, receivers and lessees engaged in the operation of telephones for hire, and their services, practices, accounting, rates and charges in intrastate commerce, as well as the ability to prevent discrimination and preference between persons and locations.

The issue in the pending South Dakota and Massachusetts cases presents questions of vital concern to the people of every state in the Union. Briefly stated, it is as follows:

Does the joint resolution of Congress deprive the states of their right to regulate the rates of telephone companies which are being temporarily operated by the Government as a war measure, especially in view of the fact that actual hostilities with foreign nations have ceased, and that we are not menaced by invasion, insurrection or rebellion?

This nation is not now engaged in actual warfare. As a result of the armistice the German Government surrendered such a large portion of its war equipment as to render itself apparently unable to renew the conflict and has permitted the occupation by the Allied troops of large and valuable portions of its territory. Our troops are being speedily demobilized; many of the Government agencies created during the war have been disbanded and we are fast approaching a normal peace basis. At this

writing the peace representatives of the German Government are assembled in Versailles to receive the peace terms of the Allies.

Unusual significance should be attached to the announcement made by the Postmaster General that he has recommended the return of the cable systems not later than May 2nd. This is an admission that there is no war emergency. If Government operation of communicating systems between foreign countries ceases on May 2nd, it naturally follows that the Government should promptly release the control and operation of the telephone and telegraph systems.

The telephones were taken over by the Government August 1st and the Hon. Albert S. Burleson, Postmaster General, was placed in charge. The President's proclamation included all telephone companies, but Mr. Burleson immediately released the rural lines. At an early date he announced the policy of standardizing toll and exchange rates and committees were appointed to investigate and report schedules of rates. The standard toll rates inaugurated by Mr. Burleson in December were to become effective January 21st. Substantial increases were made in intrastate rates without complying with state laws. State utility commissions were not requested to investigate or approve the reasonableness of the new schedule. Many states sought to secure relief by court proceedings. In this connection it may be stated, although the precise rates are not involved in the pending case, that the Postmaster General has also increased local or ex-

change intrastate rates in a large number of cases without the sanction of state regulating authorities.

When Congress passed the wire resolution there were over 10,000 telephone companies in the United States. These were divided into three general classes—rural or farm lines—local exchange properties—and toll lines. Generally speaking, the service of rural and exchange properties is local and the messages between subscribers are not transmitted over interstate lines. A substantial per cent of toll business is between points wholly within a state. The rural lines were built and are being maintained by local capital, and the same rule applies to a great many exchanges.

Congress had knowledge of these facts. It is therefore earnestly contended that Congress did not intend to deprive the states of the right to regulate these local companies, or to take from the people the existing remedy against unjust rates and service secured by the laws of the several states. If Congress had intended to place the sole and unrestricted authority in the President it would have said so in language that is not open to debate.

This is not a Suit Against the United States.

The controversy is not of a political nature, nor does it extend to the constitutional rights or authority of the President. In so far as the President is concerned here it is by reason of the power delegated to him by Congress and the question as to the extent of the power delegated is not affected by his political office or standing. As said by Chief Jus-

tice Marshall, in *Marbury* v. *Madison,* 5 U. S. (1 Cranch.) 137, 166-171: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety of judicial interference is to be determined."

This action is not brought to interfere with the property of the telephone company. It is not brought to interfere with or control the exercise of discretion or authority on the part of any officers or agents of the executive department of the Government, as to those duties which the law requires them to perform and as to those matters which come within their jurisdiction. It is to enjoin such officers or agents from acting unlawfully, and as to matters concerning which they are given no jurisdiction or authority under the act.

That such an action is within the jurisdiction of the courts—either state or federal—is amply sustained by the authorities.

The leading case is that of *United States* v. *Lee,* 106 U. S. 196, which has been followed by a long line of authorities. The case was ejectment. The defendants were military authorities, holding property at Arlington, Virginia, under the direction of the President, as a military station and a national cemetery, and it was alleged not only that the defendants were acting under the direction of the Executive Department, but that their possession was the possession of the United States. Accordingly the Attorney General appeared, insisting that the court had no jurisdiction and the action should be

dismissed. As was said by Mr. Justice Miller, delivering the opinion of the Supreme Court:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power."

The jurisdiction of the court was sustained. It was held that the court was competent to decide the issues before it, and having found that title was in the plaintiff, and having rendered judgment against the defendants, its judgment was affirmed. It was said in the opinion:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and bound to obey it. * * *
>
> "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority and without any compensation, because the President has ordered it and his officers are in possession?
>
> "If such is the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and protection of personal rights.
>
> "It cannot be, then, that when, in a suit between two citizens for the ownership of real

> estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'stop here; I hold by order of the President, and the progress of justice must be stayed!' "

Another case, having a direct bearing upon the point under discussion, is that of *Osborn* v. *U. S. Bank,* 9 Wheat. 738. The case was this: The State of Ohio having levied a tax upon the branch of the bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the State of Ohio, was about to proceed to collect said tax by seizure of the money of the bank in its vaults, and an amended bill alleged that he had seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the state treasurer.

One of the objections to the jurisdiction of the court was the conceded fact that the State of Ohio, though not made a party to the bill, was the real party in interest; that all the parties sued were her officers, concerning acts done in their official character and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued that what could not be done directly could not be done by suing her officers. It was insisted that, while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction.'

The Supreme Court of the United States affirmed the decree ordering a restitution of the money, and, in its opinion said:

> "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford him could his principal be joined in the suit."

The case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, is an important authority upon this branch of the case. In that case suit was instituted in the Supreme Court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing original proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. It was alleged in the bill that the lines were established by the secretary unlawfully, although authority therefor was claimed under a

certain Act of Congress. The bill was demurred to and one of the grounds of demurrer was that "This is virtually a suit against the United States." Upon that point it was said in the opinion:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully evaded. (Cases cited.) And in the case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (Cases cited.) And it is equally applicable to a federal officer acting in excess of his authority or under an authority nor validly conferred."

It is important to note also that the controversy is not removed from the sphere of the judicial power simply because it relates to actions claimed to have been directed to a war end. If the mere fact of an alleged war purpose makes a controversy inherently non-justiciable, the principle would apply with greatest force to the action of military commanders under the direction of the commander-in-chief. For while Congress may declare war, it is to the President, as commander-in-chief, to whom is committed, by the Constitution, the direction of military operations. This broad authority, for the actual conduct of the war may not be impaired, even by Congress itself. (*Milligan's case*, 4 Wall. 2, 139.)

Yet, even in the actual zone of conflict, when a military commander takes private property to prevent it falling into the hands of the enemy, or for the purpose of converting it to the public use, the urgent necessity which justified this course is the proper subject of inquiry by the courts. If such necessity is found not to exist, such military commander is a trespasser and cannot justify by showing the orders of his superior officer. The alleged war purpose, even in the actual conduct of campaigns, does not make the controversy non-justiciable or oust the courts of jurisdiction to inquire whether the property of the citizen has been invaded rightfully. *Mitchell* v. *Harmony,* 13 How. 115.

It is also established that a controversy with respect to the lawfulness of the action of a naval officer in seizing a ship is none the less justiciable because he was acting under the direct instructions of the President. *Little* v. *Barreme,* 2 Cranch. (U. S.) 170.

In this case it was held that instructions from the President, to a naval officer, to seize property illegally, did not protect the officer from damages. The officer had seized a Danish brigantine under suspicion of violating the Act of Congress, known as the non-intercourse law. The fifth section thereby authorized the President to give instructions to the commanders of the public armed ships of the United States to stop and examine vessels of the United States under certain circumstances. The President issued explicit instructions, which, however, were found to go beyond the authority conferred by the

Act of Congress. Mr. Chief Justice Marshall, in delivering the opinion of the court, said:

"These orders which were given by the executive under instructions of the Act of Congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this misconstruction of the Act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an Act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce the suspicion that the vessel was *American,* would excuse the captor when the vessel appeared in fact to be neutral.

"I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was very much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. * * * I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against the government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

The foregoing authorities seem to us to conclusively establish the proposition that a suit brought to enjoin the unlawful exercise of authority, even though it be directed against an executive officer of the government, is not a suit against the United States. Especially is this true when no such officer is made a party and the suit is directed only against a corporation, permitted to do business under and subject to the laws of the state.

The Joint Resolution Conferred No Power Over Intrastate Rates.

The power to regulate intrastate telephone rates, without complying with the laws in relation thereto, is claimed to be based upon a certain provision contained in the Joint Resolution of Congress of July 16, 1918. The provision referred to is as follows:

> "The President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange or ratification of the treaty of peace."

The most striking feature of this provision, in reference to the claim mentioned, is the entire absence of language which in terms confers such power. The rate making power is of such importance that the granting of it has always heretofore been the

occasion of much controversy. When the power has been granted it has been surrounded with adequate safeguards. It has never been constitutionally granted in this country without the establishment of standards by the legislative body itself.

Notwithstanding these facts the court is now asked to hold that Congress intended to and did confer this power as a mere incident to the possession and control of the telephones. As this court has so often said in substance: If Congress had intended to convey this tremendously important power it would have said so in the most unequivocal language. The strongest argument that it did not intend so to do is the entire absence of such language.

Clearly the possession of such power was not necessary to enable the President to meet the emergency through which the country was passing. Rapidity and secrecy in the transmission of government communications was of course essential, as was also the closing of the wires to uses which would aid the enemy. Those matters were provided for and it seems to us that those were the matters which Congress had in mind when it passed the Joint Resolution.

This is indicated by the language employed. The President was authorized "to take possession and assume control" of the wires. The resolution did not stop there. Yet if the government's contention is to be upheld it might have done so, as it is claimed that the words quoted were all embracing. Congress added the significant words, "and to operate

the same in such manner as may be needful or desirable for the duration of the war." By the addition of these words it was shown that the control was for the purpose of operation and was limited to the operation of the wires. If that is not so, then the addition of the words regarding operation were entirely superfluous.

The Power of Rate Regulation Could Not Be Constitutionally Conferred Upon the President.

The power claimed for the President is open to the constitutional objection which seems to us to be insuperable. It is well established that the regulation of rates is a legislative function. *Milwaukee Elec. R. & L. Co.* v. *Railroad Commission,* 238 U. S. 174, 180. As such it cannot be delegated to the President or any other executive officer. *Field* v. *Clark,* 143 U. S. 649, 692. Therefore, even if the Joint Resolution were intended by Congress to confer authority on the President to regulate intrastate rates, it did not accomplish such purpose in a constitutional manner and accordingly did not accomplish it at all.

Effect of the Proviso on the Power Conferred by the Joint Resolution Considered.

Apparently to remove all possibility of misconstruction, Congress added a proviso to the Joint Resolution. The proviso is as follows:

> "Provided further, that nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such

laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

In considering this proviso, it is well to call attention, at the outset, to the fact that it is not intended to confer the right to exercise the police power upon the several states, because such power is inherent in them and not in Congress. It has never been surrendered to the Federal Government, and therefore there was no need for Congress to authorize its continued exercise.

Tenth Amendment U. S. Constitution.

South Carolina v. *United States,* 199 U. S. 437.

Keller v. *United States,* 213 U. S. 138.

The power of each state to regulate the rates to be charged for public utility service performed wholly within the state is beyond question. The power is often called the police power. When it is exercised by the enactment of laws, or orders of administrative bodies, those laws and orders are usually called police regulations.

The term police regulation is no narrower than the term police power. This is shown by the statement, in the case of *Chicago B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561, that "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

It is further shown by the following quotation

from the opinion in the case of *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* rendered by this court on March 24, 1919, reported on page 116 of U. S. Supreme Court Advance Opinions No. 6:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state *in the exercise of its police power. Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *German Alliance Ins. Co.* v. *Lewis, Superintendent of Insurance of the State of Kansas,* 233 U. S. 289, 407." (Italics ours.)

And further:

In *Reagan* v. *Trust Co.,* 154 U. S. 413, 417, Justice Brewer used this language:

> "We are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

In the case of *Sligh* v. *Kirkwood,* 237 U. S. 52, at page 58, Mr. Justice Day said:

> "The limitations upon the police power are hard to define and its far reaching scope has been recognized in many decisions in this court. * * * The police power in its broadest sense includes all legislation and almost every function of civil government. It is not subject to definite limitations, but is co-extensive with the interests of the case and the safeguards of public interest. * * * It embraces regulations designed to promote public convenience or the

general prosperity or welfare as well as those specially intended to promote the public safety or the public welfare. * * * It is the most essential of powers, at times the most insistent and always one of the least limitable of the powers of government."

"The police power is the broadest in scope of any field of governmental authority. It is inherent in the very nature of organic society. * * * It is as limitless as man's aspirations, and conception of human welfare and its exercise is likewise limitless where not fundamentally restrained."

State v. *Donald,* 151 N. W., 331, 369 (Wis.).

See also the case of

Hammer v. *Dagenhart,* 247 U. S. 251.

As early as the case of *C. & N. W. R.* v. *Fuller,* 17 Wall. 560, it was held that railroad regulatory legislation was an exercise of the police power. In that case the Supreme Court of the United States had before it an act of the legislature of Iowa requiring railroad companies to fix their rates for the transportation of freight and passengers and publish those rates and cause a printed copy of them to be posted in all stations and depots, the copy to remain posted during the year. The court said:

"It is not, in the sense of the constitution, in any wise a regulation of commerce. *It is a police regulation* and as such forms a portion of the immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves." (Italics ours.)

It is thus evident that the term "police power" has been used in both the sense of the protection of

the public health, safety, and morals, and of the public convenience, and the general welfare, and that the term "police regulations" has no other or different meaning than "police power." It is simply used to designate all regulations that may be made under the exercise of "police power," whether relating to the public health, safety, morals, convenience, or general welfare, and includes the regulation of public utilities as to their rates and charges, and all like matters which directly concern the public welfare. Laws regulating the rates and charges of public service corporations were passed in response to an insistent public protest against unreasonable and excessive charges and discriminatory practices. The protection secured to the people through the various state laws and regulating commissions has been substantial. Indeed, the regulation of rates has largely occupied the attention of officers for many years, resulting in preventing rebates, discrimination, and the adoption of schedules of reasonable charges. It seems plain, therefore, that Congress, by including this proviso in the Joint Resolution, has expressly recognized the right of the states to insist upon a compliance with the state law relating to changes in intrastate rates.

No claim can be successfully urged that such compliance will affect the transmission of government communications within the meaning of the proviso.

The claim is made that, if the proviso is construed to mean that the right to regulate intrastate rates is reserved to the states, it would possibly prevent the President from obtaining sufficient revenue to enable the telephones to be kept in an efficient condition and would thereby affect such transmission.

Such would not be the case. It would only mean that the President must obtain authority to secure necessary additional revenue on intrastate business through the several state commissions. That this would not be impracticable nor unduly burdensome is shown through the one practical application which it has had. We refer to the increase in express rates of July 1, 1918, which had been ordered on interstate traffic by the Interstate Commerce Commission. Application for a like increase was made by telegraph to the various state commissions and the increase was promptly granted, as requested, by all except five states. These five states have since granted such increases, subject to certain modifications necessary to meet local conditions.

The argument that the various states might refuse requested increase and thus create confusion, loses sight of the fact that the standard of rates in the various states and interstate commerce is the same; that is to say, just and reasonable rates. Such being the fact, it cannot be assumed that the state commissions will fail to perform their duty and authorize any rates which are not just and reasonable.

Legislative History.

We have attached to this brief, as Appendix A, extracts from the Congressional Record showing portions of the debate on the Telephone Resolution. It is clear from a perusal thereof that Congress did not think that it was conferring any rate regulatory power whatever upon the President; and that it intended to leave such matters for subsequent legislation should an occasion arise for its enactment.

Applicability of Present State Laws.

It is claimed that the reservation to the states of their existing laws or powers in relation to "taxation or the lawful police regulations" is of no effect because no state has ever enacted any law applicable to telephone companies which are operated by the Federal Government; that until the power is exercised by the passage of appropriate legislation, no state law is being violated.

Carrying this proposition to its logical conclusion, it would follow that no state in the Union today could tax the property or earnings of telephone companies under Federal control, nor could such state take any action against said companies for the protection of the health, convenience, or welfare of its citizens. Its power to regulate the location of poles, wires and cables, to require reasonable service, and proper extension, and all such matters would have to rest in abeyance until suitable legislation could be passed by the state.

To assert the proposition is to deny it. Congress had knowledge of the large body of police legislation in the various states. In the Joint Resolution Congress said in effect:

The President may take over the control and operation of the telephones and operate them, but nevertheless nothing shall be done by him which shall amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the states.

Congress was dealing with existing laws and in-

tended by said provisions to preserve unimpaired that large and useful field of legislation, regulation, and practices which have developed during the past thirty-five years.

It seems to us that the argument that the present state laws are inapplicable is answered by the decision of this court, that the United States is a corporation. *Chisholm* v. *Georgia,* 2 U. S. 419. All of the state laws expressly apply to telephone systems operated by corporations and individuals. Therefore, if it be held that the railroads are operated by the government they are operated by a corporation; and if they are held to be operated by the President, then they are being operated by an individual. In either case the operation comes within the provision of the state law.

It is not an answer to the argument to say that the term *corporations,* as used in the various state regulatory laws, was not intended to mean corporations such as the United States, because it was not contemplated that the United States would ever operate the railroads. This is so for the reason that the state laws were passed long after the decision referred to, with a presumptive knowledge of a broad scope of the word and yet its application was not confined, in the various acts, to corporations organized under the laws of the various states or of Congress.

It was held in the case of *Smyth* v. *Ames,* 169 U. S. 466, and *Reagan* v. *Mercantile Trust Company,* 154 U. S. 413, that the state regulatory laws applied to railroads operated by corporations organized

under the laws of Congress, although at the time of the passage of the acts the only railroads operating in the United States were those organized under the state laws.

The fact that the government was not operating the telephone systems at the time of the passage of the state laws would not necessitate the placing of a restricted meaning upon the word corporation. On the contrary, it should be given its broad meaning wherever that is necessary to carry out the apparent purposes of the act as is the case here.

This course has been uniformly applied by this court in construing the Federal constitution. As an example of such construction, attention is called to the meaning given to the word commerce. It has been held to apply to communication by telephone and telegraph and various other instrumentalities, although they were not in existence at the time the constitution was adopted, and could hardly have been said to have been within the contemplation of the framers of that document.

Where the state laws expressly apply to lessees of telephone systems, the case is even stronger for it is now almost uniformly held that the relationship existing between the telephone systems and the government is that of lessor and lessee. In such cases then the argument of the plaintiff in error would necessarily fall.

We submit the rule to be that even as to the governmental purposes of such agency, the local laws will control unless Congress, for the purpose of protecting such agency in its governmental pur-

poses, has by appropriate and reasonable legislation protected such agency from state interference. This rule flows from and is based upon the public powers of the state and its sovereign control over its local and domestic affairs.

A clear statement of the general rule is taken from the Encyclopedia of Supreme Court Reports, Vol. 4, at page 204:

> "A corporation organized under the laws of the United States is subject to the control of the state as to rates which are wholly within the state. The fact that it receives all its franchises from Congress, that among those franchises is the right to charge and collect tolls, does not exempt it, as to business done wholly within the state, from the control of the state in all matters of taxation, rates, and other police regulations."

See also

Reagan v. *The Mercantile Trust Co.*, 154 U. S. 413.

Thomson v. *Union Pacific*, 76 U. S. 579-590.

Conclusion.

Because of the foregoing principles and authorities, the judgment of the Supreme Court in the State of South Dakota should be affirmed and the judgment of the Supreme Judicial Court of the State of Massachusetts should be reversed.

Respectfully submitted,

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RAILROAD COMMISSION OF SOUTH CAROLINA.

RAILROAD COMMISSION OF TEXAS.

PUBLIC SERVICE COMMISSION OF VERMONT.

PUBLIC SERVICE COMMISSION OF WASHINGTON.

PUBLIC SERVICE COMMISSION OF WYOMING.

PUBLIC UTILITIES COMMISSION OF UTAH.

BOARD OF NORTH DAKOTA RAILROAD COMMISSIONERS.

West Virginia Public Service Commission.

APPENDIX A.

In the discussion of the legislative history of the telephone resolution, the page numbers refer to the Congressional Record, Volume 56. The resolution was introduced in the House and referred to the Committee on Interstate and Foreign Commerce. (Page 9368.) On July 2nd the resolution was transferred to the Committee on Military Affairs.

Following are portions of the debate which bear upon the congressional purpose in regard to the regulation of telephone rates:

> "Mr. Bankhead (p. 9470): There is one matter that has not been touched on in general debate, and that is a practical proposition—the regulation of rates and tolls to be charged in the event the President should see fit to take them over. *What did the committee have in mind along that line?*
>
> Mr. Snook (of Ohio, a member of the committee): I will be glad to answer the gentleman. The committee had in mind treatment of that subject as we treated the railroad situation. This is simply a resolution to empower the President, in case the necessity arises, to take over the telegraph and telephone systems. Then if he does that, Congress will exercise the power that it did in the railroad matter, and fix the rates and determine the way in which the matter should be handled. * * * (Referring to the committee hearings.) In his (the Secretary of the Navy) opinion, he thought it would be necessary, if we continued in the war, that the government should have a right to exercise a control over the people who were sending these messages, the employes of the telegraph companies; otherwise there might be danger of secrets or plans by which the government was

All reference to The Congressional Record which are made in this brief are to the advance sheets and not the bound volumes.

carrying on the war leaking out and being disclosed."

On the same day, July 5, 1918, (see Congressional Record, p. 9473), the last part of the resolution was introduced by Mr. Montague.

Mr. Sims said (Congressional Record, July 5, 1918, p. 9475):

"But looking at the resolution, which is in the exact language, word for word, of the act of 1916 under which the railroads were all taken over, and then considering the great railroad-control bill as we did for many weeks, in which every question pertaining in nature and substance to this resolution was discussed, I thought it would be an assumption on my part to repeat at great length in a report information which everybody knows. * * *

"I am not prepared to say that it will not become necessary, but I hope it will not become necessary, and if it does not it will not be done. Therefore there was no use in a long program of detailed legislation as to the operation, as to the compensation, in advance of whether or not it would ever become necessary to consider such legislation. If it is found necessary by the President to exercise the power herein conferred, as a matter of course Congress will do as it did in the railroad-control matter. There will be supplementary legislation to take care of every question that will arise, and it will not be railroaded through the House without ample time for consideration.

"Mr. Walsh: Will the gentleman state what that urgent necessity is?

Mr. Sims: It has been mentioned in the public press that a strike has been ordered to take place which will affect the Western Union employes by next Monday, just as the railroad strike was called in September, when the House

rushed through the Adamson Bill and the President signed it on Sunday, when the strike was called for Monday, Labor Day. We were not in war then and we are now."

(Page 9477.)

"Mr. Griffin: I notice that you say 'that just compensation shall be made for such *supervision,* possession, control or operation.' Now, is it in contemplation that in the event that the President decides to supervise the properties compensation shall be given to the companies?

* * * * *

Mr. Sims: I do not think there is the remotest possibility of the government's taking supervision because they are now supervised by different states."

(Page 9478.)

Mr. Montague (Virginia, a member of the committee), offered the proviso amendment, which was enacted in the resolution.

"Mr. Esch: Is that language the language of the railroad act?

Mr. Montague: It is except that the language of the railroad act is 'transportation of troops, war materials and government supplies.' Of course, that language is inapplicable to this bill, and I simply used the language 'Government communications,' which would embrace all communications by wire or telephone.

Mr. Fess: Will not the amendment operate as a limitation, so that the President taking over the telephone and telegraph lines under the authority granted must take them over subject to the limitations attached?

Mr. Decker: That is true, and I make the suggestion that it is true of the one we just adopted here, and it is far reaching.

Mr. Montague: Does the gentleman carry in his mind the distinction between regulation and

> limitation? We in this committee have not brought in any measure of a regulatory character. The amendment that I propose is simply an amendment of limitation and preservation of existing powers."

At page 9479 we find the interesting statement in response to the suggestion that the President already had the power to take over the wire systems:

> "Mr. Sims: I think I can suggest a fair approach to an answer to the question whether or not the President has the power contained in this resolution, that it was submitted to the Department of Justice and after a thorough investigation and study the Department of Justice reported to the President that he did not have the authority."

At page 9481 the title was then amended by unanimous consent to correspond with the resolution. The resolution came up for consideration in the Senate in its amended form July 6th, page 9502, and under the present title, and was referred to the committee on interstate commerce.

On July 8th, page 9610, it was reported back without recommendation, after consideration of a little over an hour (p. 9611).

On page 9506 it was stated by Senator Cummins:

> "It will be, in my opinion, no short job to compose the legislation which is necessary to take over these properties. I do not want it to happen again, as it has happened with the railroad companies, that immediately after their occupation or possession by the government we experience an increase of anywhere from 25 to 300 percent in the rates. When we take over the telephones of the country * * * and take over the telegraph companies, I think it is

manifest we ought to take them over under such conditions as will protect the people of this country against unjust rates."

On page 9614, we find the suggestion made as to the possibility of a strike. It was stated at 9614 by Mr. Penrose:

"Mr. President, I do not think in the history of any legislative body from here to Russia has a more high-handed proceeding been perpetrated than that which we have witnessed this afternoon. I speak cooly and advisedly, although my indignation runs high. We are supposed to be in a battle for liberty and to be engaged in a tremendous conflict to bring about the downfall of autocracy, and yet here in the Senate of the United States every principle of orderly constitutional procedure and of liberty has been outraged and violated."

And at page 9617, it was referred back to the committee. On July 10th, page 9685, it was again reported and read by title. At page 9729 on July 11th, the matter was again brought up for consideration. Reference was made by Mr. Smith to the question of tolls in the following language and upon possible abuse:

"The question of tolls and rental and hours of service is very important to the telephone patrons, and any unnecessary interference with present plans should have the most careful consideration."

This discussion was resumed on July 11th, page 9732. It was stated at page 9733 by Mr. Underwood:

"I will say to the Senator from Ohio that so far as I know there is no emergency which exists in this hour for this legislation. That is the reason why I did not think there were any hearings necessary."

In discussing the purpose and effect of the Act, Senator Smith of South Carolina said:

(Page 9747.)

"Mr. Smith (South Carolina, chairman Interstate Commerce Committee): If the Senator will permit me, this is simply an enabling act. If it should transpire that further legislation is necessary in order to preserve the public welfare in this emergency, doubtless we would adopt the same procedure as we did with reference to the railroads."

* * * * *

Referring further to the analogy with the proceedings in the railroad act.

"Smith (South Carolina): But we did not, if the Senator will allow me, have any hearings on the *enabling act*. It was simply when we *undertook* to *enlarge the scope of the authority* that hearings were held.

* * * * *

Mr. Kellogg: Mr. President, if the Senator will permit me, when the enabling act was passed in relation to the railroads, nobody dreamed that it gave power to take over all the railroads in the United States. It simply provided for the taking over of railroads necessary for the transportation of government supplies and material; and it was passed, with a view to the situation on the Mexican border and nothing else.

Mr. Smith (South Carolina): If the Senator from Ohio will allow me further, I should like to suggest to the Senator from Minnesota that the same thing is true of the present legislation. Suppose the President had seen fit to confine himself simply to a comparatively small use of the railroads for military purposes. *Then the subsequent legislation would not have been necessary.* Suppose he simply finds it

necessary to take over a few telegraph and telephone lines for military purposes in the emergency. *Then no subsequent legislation will be necessary.* I think, however, he will pursue the same course with reference to this subject that he did in regard to the railroads if he finds that it is necessary to have additional legislation in order to attain the object sought."

(Page 9833):

"Harding: Mr. President, while the chairman of the committee is on his feet, I want to ask him if he has any information as to what the government expenditure is going to be in taking over these properties, and securing its service alone, not thinking in any way of the maintenance of the service which the individual citizen gets?

Smith (South Carolina): Mr. President, as I understand this question, of course it may be due to my obtuseness, but my understanding of it is that it is to enable the government to assume control, if the circumstances jutsify it, of any part or the whole, if need may be. Of course, I do not suppose they can determine what will be the subsequent necessary procedure until the emergency has crystallized to a point where they will put their hands on whatever is necessary for the common defense; and then, perhaps—I am just making this as a suggestion—the *legislation* may take a line similar to that which was taken when, under the enabling act, the railroads were taken."

MACLEOD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, *v.* NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 957. Argued May 5, 6, 1919.—Decided June 2, 1919.

Decided on the authority of *Dakota Central Telephone Co.* v. *South Dakota, ante*, 163.
232 Massachusetts, 465, affirmed.

THE case is stated in the opinion.

Mr. William Harold Hitchcock, Assistant Attorney General of the Commonwealth of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the Commonwealth of Massachusetts, was on the brief, for petitioners:

The respondent through its officers and employees is now operating the telephone system owned by it as an instrumentality of the Federal Government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the joint resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed.

Jurisdiction of Massachusetts over the regulation of intrastate telephone rates, after action by the President under the Joint Resolution of July 16, 1918, was reserved to it by that resolution. We raise no question but that Congress had the power to authorize, or even to require, the taking over of the telegraph and telephone systems of the country by the Federal Government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers. Obviously, Congress could not authorize the taking of these systems by the Federal Government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a State as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *a fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the admitted purpose of the establishment of the rates in question. Such action seems to go beyond the scope even of the far-reaching war powers. However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the States should be interfered with as little as possible. The question now before the

court turns entirely upon the interpretation to be given to this proviso.

The language of the proviso of the joint resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the States show the breadth of that reservation. The control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear that, to the extent that the public is to be permitted to use them as before, the regulative powers of the States should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government messages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

The history of the joint resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion.

This suit is not beyond the jurisdiction of the Massachusetts court on the ground that the United States is a necessary party or that the suit is in effect against the United States.

The Solicitor General for respondent. See *ante*, 164.

Mr. William I. Schaffer, Attorney General of the Commonwealth of Pennsylvania, and *Mr. Bernard J. Myers*, Deputy Attorney General of the Commonwealth of Pennsylvania, by leave of court, filed a brief as *amici curiæ*, on behalf of the Commonwealth of Pennsylvania.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ*, on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. John G. Price, Attorney General of the State of Ohio, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Ohio.

Mr. Albert C. Ritchie, Attorney General of the State of Maryland, by leave of court, filed a brief as *amicus curiæ*, on behalf of the State of Maryland.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The petitioners, composing the Public Utilities Commission of the State of Massachusetts, filed their bill against the respondent to compel it to enforce certain telephone rates for intrastate business established in conformity to the state law and to forbid the putting into effect of conflicting rates fixed by the Postmaster General in a schedule by him established and the enforcement of which he had ordered.

On the petition and answers the case was reserved for the consideration of the Supreme Judicial Court where it was finally decided. The court in a lucid opinion, speaking through Mr. Chief Justice Rugg, having after full consideration reached the conclusion that the Postmaster General was empowered by the law of the United States to fix the schedule of rates complained of and that the Telephone Company was authorized by such law to put in effect and enforce such rates even though in doing so the rate established by the Public Service Commission of the State was disregarded, held that the suit was virtually one against the United States which the court was without

195. Counsel for the United States.

power to entertain and entered a decree of dismissal for want of jurisdiction. But the form of the decree thus entered affects in no way the control and decisive result, upon every issue in the case, of the ruling this day announced in *Dakota Central Telephone Co.* v. *South Dakota*, *ante*, 163. It follows therefore that in this case our decree must be and is one of affirmance.

Affirmed.

MR. JUSTICE BRANDEIS dissents.